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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 709.

UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JUNE 8TH, 1911.

(22,754.)

(22,784.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1910.

16977.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Return.

Geo. T. Simpson, Geo. W. Peterson, Attorneys for Respondent, St. Paul, Minn.
Davis, Kellogg & Severance, Attorneys for Appellant, St. Paul, Minn.

(Endorsed:) Filed Oct. 27, 1910. I. A. Caswell, Clerk.

2 STATE OF MINNESOTA:

In Supreme Court, October Term, 1910.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Summons.

The State of Minnesota to the Above Named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which said complaint is hereto attached and herewith served upon you, and serve a copy of your answer thereto upon the subscribers at their office in the capitol building in the City of St. Paul, Ramsey County, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in the above entitled action will take judgment against you for the sum of $9,719.66, together with costs and disbursements.

Dated May 6, 1910.

GEORGE T. SIMPSON,
Attorney General.
GEO. W. PETERSON,
Assistant Attorney General.

(Endorsed:) Filed Oct. 3, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

3 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Complaint.

The State of Minnesota complains of the defendant above named and for cause of action alleges:

I.

That the defendant during all times herein mentioned *and* has been and now is a joint association organized and existing under and by virtue of the laws of the State of New York, and during all of said times has been and now is engaged in the business of conveying to, from and through this state, and parts thereof, money, packages, gold, silver plate, and other articles by express.

II.

That said defendant under and pursuant to the laws of this state during all the times herein mentioned, has been required to make to the proper State officials of the State of Minnesota, a true
4 and just return showing its taxable gross earnings within the state for and during each year ending December 31st, the said return to be verified by the officer of the defendant making the same; that the statutory percentum upon the taxable gross earnings of said defendant is in commutation of the tax upon its property within this state.

III.

That covering the taxable gross earnings for the years 1899 to 1909, both inclusive, the defendant has failed and neglected to furnish a true and just return of all its taxable gross earnings as provided by law, in this that it has failed and neglected to report the following amounts which are tabulated in detail in schedules No. 1 to No. 4 hereto attached and made a part of this complaint, and upon which taxable gross earnings the defendant should have paid the amount of taxes set opposite thereto, being the statutory percentum on said gross earnings, to-wit:

SCHEDULE No. 1.

Omitted earnings	$54,209.19
Back taxes due @ 3 & 6%	2,991.29

Items.

"Intermediate Business," i. e., earnings on express business for the years 1899 to 1908, inclusive, handled between points in Minnesota, but the same passing through another state en route.

SCHEDULE No. 2.

Omitted earnings	$9,702.89
Back taxes due @ 3 & 6%	504.47

Items.

"Interstate Transfer Business and Tonnage Revenue," years 1899 to 1905, inclusive, i. e., earnings on express business handled between points in Minnesota located on the lines of defendant company, but where the originating point, or terminating point, or both, is a town located outside of the state of Minnesota on another express company's lines.

SCHEDULE No. 3-A.

Omitted earnings	$101,404.94
Back taxes due @ 3 & 6%	5,788.15

Items.

"Earnings on Money Order Business" during the period 1899 to 1909, both inclusive. These orders were sold and issued by defendant Company in the state of Minnesota and the same were redeemed both in and outside of the state of Minnesota.

The omitted earnings and back taxes due on money orders which were sold and also redeemed in the state of Minnesota, the same being included in the above amount, aggregate:

Earnings	$31,946.63
Taxes	1,823.47

SCHED. 3-B.

SCHEDULE No. 4.

Omitted earnings	$14,491.66
Back taxes due @ 3 & 6%	435.75

Items.

Miscellaneous items not reported for taxation, the same representing omitted earnings on intrastate express business handled between points in Minnesota by defendant company during the calendar year 1899.

Total omitted earnings	$179,808.68
Back taxes due @ 3 & 6 %	9,719.66

6 IV

That an examination of the return of the defendant of its taxable gross earnings for a period of time above set forth has been duly made by the Public Examiner of Minnesota, and the errors and omissions therein as above set forth were duly discovered and reported to the said defendant, and a demand was made by the proper officers of the state that the return of the defendant during the times in question be corrected so as to include the above and foregoing items of gross earnings; but the defendant has failed, neglected and refused to correct its return in accordance with the said demands, and refused so to do, and claims that said items are not taxable gross earnings. That such omitted taxable gross earnings aggregate $179,808.68, and the taxes thereon at the statutory rate aggregate $9,719.66. Said taxes were duly assessed by the State Auditor, March 15, 1910.

V.

That the State of Minnesota has duly demanded from the defendant payment of the sum of $9,719.66, the amount of taxes claimed to be due from the defendant to the plaintiff by reason and on account of the said erroneous and omitted returns made for the purposes of taxation by the said defendant during said period of time, the taxes on the said omitted earnings for each year as hereinbefore set forth becoming due on the 15th of March of each succeeding year; that the defendant has failed, neglected and
7 refused to pay said amount or any part thereof, and so refuses now to do, and said sum remains due and payable to the State of Minnesota.

Wherefore, The plaintiff demands judgment against the defendant for the sum of $9,719.66, together with costs and disbursements of this action.

Dated May 6th, 1910.

GEORGE T. SIMPSON,
Attorney General.
GEO. W. PETERSON,
Assistant Attorney General.

SCHEDULES.

Schedule No. 1.

"Intermediate Business," i. e., Earnings on Express Business for the Years 1899 to 1908, Inclusive, Handled between Points in Minnesota, but the Same Passing Through Another State en Route.

Year.	Omitted earnings.	Back taxes due @ 3 & 6%.
1899	$4,182.63	$125.48
1900	4,526.20	135.79
1901	4,741.72	284.50
1902	5,429.52	325.77
1903	5,803.30	348.20
1904	6,685.42	401.13
1905	5,885.55	353.13
1906	6,015.32	360.92
1907	4,903.96	294.24
1908	6,035.56	362.13
Total	$54,209.19	$2,991.29

8 1909 Earnings reported under protest and taxes paid accordingly.

Schedule No. 2.

Interstate Transfer Business and Tonnage Revenue, Years 1899 to 1905, Inclusive, i. e., Earnings on Express Business Handled between Points in Minnesota Located on the Lines of Defendant Company, but where the Originating Point, or Terminating Point, or both, is a Town Located Outside the State of Minnesota on another Express Company's Lines.

Year.	Omitted earnings.	Back taxes due @ 3 & 6%.
1899	$1,156.84	$34.71
1900	1,161.62	34.83
1901	1,326.73	79.60
1902	1,307.96	78.48
1903	1,387.82	83.27
1904	1,500.89	90.05
1905	1,861.03	103.53
Total	$9,702.89	$504.47

1909 Earnings reported under protest and taxes paid accordingly.

Schedule No. 3-a.

Earnings on Money Order Business During the Period 1899 to 1908, Both Inclusive.

These orders were sold and issued by defendant company in the State of Minnesota, and the same were redeemed both in and outside of the State of Minnesota.

9

Year.	Omitted earnings.	Back taxes due @ 3 & 6%.
1899	$4,921.15	$147.63
1900	4,950.50	148.52
1901	5,019.17	301.15
1902	5,437.48	326.25
1903	5,301.19	318.07
1904	11,373.84	682.43
1905	19,218.39	1,153.10
1906	14,715.96	882.96
1907	14,661.31	879.68
1908	15,805.95	948.36
Total	$101,404.94	$5,788.15

For year 1909 defendant company reported the earnings under protest and taxes paid accordingly on all money orders which were sold by this company in Minnesota. The earnings as reported for said year amounted to $6,319.20, taxes paid $379.15. The same has been credited to the company, the amounts not being included in the above computation.

Schedule No. 3-b.

Statement of the Money Order Business During the Period 1899 to 1909, Both Inclusive.

These orders were sold and issued by defendant company in the State of Minnesota and the same were also redeemed in the State of Minnesota.

10

Year.	Earnings.	Taxes @ 3 & 6%.
1899	$1,550.65	$46.52
1900	1,559.90	46.80
1901	1,581.54	94.89
1902	1,713.34	102.80
1903	1,670.40	100.22
1904	3,583.89	215.03
1905	6,054.03	363.24
1906	4,635.50	278.13
1907	4,618.53	277.11
1908	4,978.85	298.73
Total	$31,946.63	$1,823.47

1909 (Earnings reported under protest and taxes paid accordingly).

During the year 1909 defendant company reported earnings under protest amounting to $6,319.20 and paid taxes at six percentum accordingly $379.15.

Schedule No. 4.

Miscellaneous Items Not Reported for Taxation, the same Representing Omitted Earnings on Intrastate Express Business Handled between Points in Minnesota by Defendant Company during the Calendar Year 1899.

Omitted earnings.	Back taxes due @ 3%.	Explanation.
$12,372.00	$371.16	20% deduction item.
968.66	29.06	Intra-state Transfer business.
37.66	1.13	Newspaper earnings.
1,113.34	33.40	Joint account business with other express companies.
$14,491.66	$434.75	

11 STATE OF MINNESOTA,
County of Ramsey, ss:

George T. Simpson being duly sworn on oath deposes and says, that he is the duly elected, qualified and acting attorney general of the State of Minnesota; that he has read the foregoing complaint and knows the contents thereof; that the facts therein stated are true, except those stated on information and belief, and as to those he believes them to be true.

GEORGE T. SIMPSON.

Subscribed and sworn to before me this 6th day of May, 1910.
[NOTARIAL SEAL.] SADIE H. YOUNG,
Notary Public, Ramsey County, Minn.

My commission expires Feb. 9, 1912.

(Endorsed:) Filed Oct. 3, 1910. Matt Jensen, Clerk, by G. A. Johnson, Deputy.

12 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Answer.

Now comes the defendant above named, United States Express Company, and makes answer to the complaint herein as follows:

I.

The defendant admits the allegations contained in paragraph I of the complaint.

II.

The defendant admits that during each of the years 1899 to 1909, inclusive, it has made to the proper State officials of the State
13 of Minnesota pursuant to the requirements of law, returns showing its taxable gross earnings arising from business transacted by it within the State of Minnesota for each of said years respectively; and admits in this connection that it has failed and refused to include in its said returns for said years, save and except the return for the year 1909, the amounts and items set forth in the third paragraph of the complaint and in the schedules thereto attached; as to said amounts and items so omitted from said returns the defendant denies that they constitute taxable gross earnings upon which the plaintiff is entitled to assess and collect any tax from the defendant, and alleges on the contrary that the said amounts and items and each of the same were properly excluded from said returns of gross earnings subject to taxation.

III.

With respect to the items and amounts comprised in schedules numbered 1 and 2 attached to the complaint, the defendant alleges that said amounts and items and all of the same represent earnings of the defendant arising from business wholly interstate in its character and not subject to be burdened with taxation by the State of Minnesota, and that any attempt on the part of said State of Minnesota to tax said earnings is not warranted by law and constitutes an unlawful interference with and burden upon interstate commerce, and that the taxation of the same would deprive the defendant of its property without due process of law, all con-
14 trary to the provisions of the Constitution of the United States.

IV.

With respect to the amounts and items comprised in schedules numbers 3-*a* and 3-*b* attached to the complaint, the defendant alleges that said items and amounts and each of the same represent earnings arising exclusively from the sale of money orders issued and sold by the defendant within the State of Minnesota; that said money orders were in each instance issued and sold without regard to place of payment, and were in fact payable at any office or agency maintained by the defendant in the United States or elsewhere; and the defendant admits that said money orders in the amounts set forth in schedule 3-*b* attached to the complaint, were in fact redeemed in the State of Minnesota, and alleges that the balance of said money orders, earnings from which are set forth in schedule 3-*a* attached to the bill of complaint, were all paid and redeemed at points outside the State of Minnesota; the defendant denies that the earnings arising from the sale and issuance of any of said money

orders, whether the same were paid and redeemed within or without the State of Minnesota, are or were during any of the years mentioned in the complaint subject to taxation, and denies that said earnings constitute earnings arising from transportation; and as to the portion of said earnings arising from the issuance and sale of money orders paid and redeemed outside the State of Minnesota,
15 defendant alleges that said earnings are not taxable in any event, for the reason that said earnings were derived from the carrying on of interestate commerce and any attempt to tax the same constitutes an unwarranted interference with such commerce contrary to the provisions of the Constitution of the United States.

V.

Further answering the defendant alleges that during each of said years 1899 to 1909, inclusive, the State Auditor pursuant to law duly ascertained and determined the gross receipts of the defendant, assessed upon the defendant the tax by law in such case provided, and delivered to the State Treasurer for collection a draft upon the defendant for the sum so assessed; and that the defendant in each of said years duly paid to the State Treasurer the amount of the draft so drawn upon it; and the defendant denies that the State Auditor or any other official of the State of Minnesota has any power or authority to make or order any other or further assessment or assessments or taxes against the defendant than the ases-ments already made, or to collect from this defendant any taxes other than those already paid by it; and the defendant denies that the taxes demanded in the complaint herein or any of the same were duly assessed by the State Auditor on March 15, 1910, or at any other time either as alleged in the complaint or otherwise.

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VI.

The defendant alleges that it has duly returned for taxation under protest its earnings for the year 1909 on intermediate business, interstate transfer business, interstate tonnage revenue, and money order business, and has paid under protest the tax assessed on said items of earnings.

VII.

The defendant further answering alleges that at the beginning of the year 1907 in the course of negotiations between the defendant and the State of Minnesota looking to the settlement and adjustment of the matters referred to in the complaint it was mutually agreed between the State of Minnesota and the defendant that the defendant should not in any future litigation take advantage of any statutory bar by reason of lapse of time which had not at the time of said agreement, to-wit, about the month of February, 1907, already become effective; that is to say, that with respect to all claims on behalf of the State as to which the statute of Limitations had not then run, the defendant would not in the future interpose any plea based upon the Statute of Limitations; in deference to said agree-

ment, the defendant refrains from interposing the defense or lapse of time to any demands made by the plaintiff for taxes based upon earnings for years subsequent to the year 1899, but the defendant does hereby allege as a separate and additional defense to the demand for taxes based upon all items and amounts repre-
17 senting earnings for the year 1899 including the items and amounts mentioned in schedule number 4 attached to the complaint, that the said demand is barred by reason of the fact that the demand and suit thereon were not made and begun until more than six years had elapsed from the time when the taxes based upon said items and amounts became due and payable.

VIII.

The defendant admits that prior to the bringing of this action the plaintiff demanded payment of the sum of $9,719.66, the amount claimed to be due on account of said alleged omitted gross earnings mentioned in the complaint.

IX.

Except as hereinabove admitted the defendant denies each and every allegation, matter and thing in the complaint contained.

Wherefore, the defendant prays that it be hence dismissed with its reasonable costs and disbursements.

DAVIS, KELLOGG & SEVERANCE,
Attorney for Defendant,

STATE OF MINNESOTA,
County of Ramsey, ss:

Robert E. Olds came before me personally, and being duly sworn, doth say that he is one of the defendant's attorneys in the above entitled action; that the foregoing pleading is true to the
18 best of his knowledge, information and belief, and that the reason why this verification is not made by said defendant is that it and all of its officers are absent from the County of Ramsey, Minnesota, wherein resides this affiant, its said attorney.

ROBERT E. OLDS.

Subscribed and sworn to before me on this 3rd day of June, A. D. 1910.

C. W. G. WITHEE,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

My Commission expires June 19, 1914.

(Endorsed:) Filed Oct. 3, 1910. Matt Jensen, Clerk. By G A. Johnson, Deputy.

19 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Reply.

I.

The State of Minnesota hereby withdrawing its demurrer heretofore interposed, for this its reply to the answer of the defendant, denies each and every allegation, matter and thing of new matter in the answer contained, except as hereinafter admitted, qualified or expressly denied.

II.

The State admits the allegations of paragraph IV from the beginning thereof to and including the words "points outside the State of Minnesota."

III.

The State admits that the State Auditor, during the years 1899 to 1909, inclusive, ascertained the gross earnings of the defend-
20 ant, based upon the returns of the defendant and that the drafts for taxes drawn pursuant to said returns, were duly paid; but realleges that said returns did not include the gross earnings of the defendant involved in the case at bar.

IV.

The State admits the allegations of paragraph VI.

V.

The State admits the agreement set forth and alleged in paragraph VII.

Wherefore, the State of Minnesota demands judgment as prayed for in the complaint.

GEORGE T. SIMPSON,
Attorney General;
GEO. W. PETERSON,
Assistant Attorney General,
Attorneys for Plaintiff.

STATE OF MINNESOTA,
County of Ramsey, ss:

George W. Peterson came before me personally, and being first duly sworn, says that he is Assistant Attorney General; that he has

read the foregoing answer and knows the contents thereof; that the facts therein stated are true, except those stated on information and belief, and as to these he believes them to be true.

GEO. W. PETERSON,
Assistant Attorney General.

Subscribed and sworn to before me this 26th day of Sept. 1910.
[NOTARIAL SEAL.] EDNA G. LIENLOKKEN,
Notary Public, Ramsey County, Minn.

My commission expires June 1st, 1916.

(Endorsed:) Filed Oct. 3, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

21 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Stipulation.

Subject to any objection by either party as to materiality or relevancy, it is stipulated, for the purposes of this suit, that the following facts are true:

The United States Express Company is an unincorporated association of individuals, organized under a contract or articles of association or partnership, executed originally in 1854, and renewed in 1859, 1884 and 1904. The number of shares in said company was originally five thousand shares. The number of shares has been increased by resolution of the board of directors, as provided in said articles of association, to one hundred thousand shares, all of which are now outstanding and held by fifteen hundred and twenty different owners.

A copy of said articles of association, as amended to the present time, is hereto annexed, marked "Exhibit 1."

The company has never received any charter or franchise from the State.

Since its formation, the company has continuously en-
22 gaged in and prosecuted the various forms of business and enterprises set forth in its said articles, and is still engaged in the prosecution thereof.

Among the forms of business thus carried on by the defendant is that generally known as the "express" business, which may be generally described as follows: The collecting at the respective residences or places of business of shippers, and receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transporta-

tion, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employés, and at destination personally delivering at the addresses of the respective consignees, packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, certificates of stock and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, also parcels of goods, wares and merchandise requiring great dispatch or careful handling; also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay, also live animals requiring particular care and attention during transportation; also receiving and forwarding bills, notes, drafts and accounts, and receiving and returning payment thereof; also receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to the shipper.

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The kinds and classes of property thus forwarded by the express companies, as common carriers for the public generally, do not ordinarily include such articles as, by reason of their bulk or weight, are ordinarily shipped as freight, such as hay, grain, steel rails and the like.

The company during the times mentioned in the complaint has not and does not own, directly or indirectly, any means or instrumentalities of transportation, except the wagons used by it for collecting the goods of shippers at their residence or places of business and transporting the same to the stations or depots of the railroad or steamboat lines where they are to be loaded upon cars or boats, and for delivering goods to consignees at point of destination.

The express business is, and always has been, carried on under contracts made by the express companies with railroad and other transportation companies, which contracts in general provide for the transportation by the railroad company, under the personal care of employés of the express company, upon passenger trains (or in some instances upon special trains made up exclusively of cars for express matter) of goods forwarded by the express company and the payment by the express company to the railroad company, as compensation for such service, of a certain percentage of the gross receipts of the express company derived from the business transported over the line of railroad.

Under such contracts, the United States Express Company is, and for many years has been, engaged in carrying on the express business upon many lines of railroad, amounting in the aggregate to some thirty thousand miles of road, including the Lehigh Valley railroad system, the Delaware, Lackawanna & Western railroad system, the Central Railroad of New Jersey system, the Baltimore & Ohio railroad system, the Cincinnati, Hamilton & Dayton railroad system, the Pere Marquette railroad system, the Chicago & Alton railroad and the Chicago, Rock Island & Pacific railroad system. Under such contracts the United States Express Company has been, and is, engaged in carrying on the expres- business upon the

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following lines of railroad in the State of Minnesota: Chicago, Rock Island & Pacific Ry., Duluth and Iron Range Railroad, and (until April 30, 1909, but not thereafter) Chicago, Milwaukee & St. Paul Railway. The said United States Express Company during all the times mentioned in the complaint has had, and now has, offices where it conducts its business, in twenty-eight states, in the District of Columbia, in Canada, and throughout Europe.

The United States Express company has at the present time in Minnesota about fifty offices and forwards its express matter over the lines of the Chicago, Rock Island & Pacific Railway and the Duluth and Iron Range Railroad, which two companies have in the state a combined mileage of about 424 miles. Prior to April 30, 1909, the United States Express Company forwarded its express matter
25 over the lines of the Chicago, Milwaukee & St. Paul Railway, whose mileage in the state of Minnesota is about 1,238 miles. Prior to said date, April 30, 1909, the United States Express Company had over two hundred offices in the state of Minnesota.

The earnings referred to in paragraph III of the complaint, schedule No. 1, $54,209.19, on which back taxes are claimed of $12,991.29, said amounts being the totals found in schedule No. 1 of the schedules attached to the complaint, are made up as follows: Said earnings of $54,209.19 constituting earnings on express business for the years 1899 to 1908, inclusive, which express business was made up entirely of shipments delivered by the shipper to an express company in the state of Minnesota, consigned to an ultimate consignee at a second point in the state of Minnesota, which shipments were forwarded by express between the point of origin and point of destination over lines of railroad, which lines were partly within and partly without the state of Minnesota. That is to say, all of these shipments necessarily passed out of the state of Minnesota in transit. Said amount, namely, $54,209.19, is based upon the total earnings on said shipments and is not that part of said earnings apportionable to the transportation which was performed within the state of Minnesota. In arriving at said amount the total earnings received by the Express Company upon said shipments have been taken regardless of what proportion of the through carry was performed within the state of Minnesota. About 91 per cent of the mileage
26 under this item is within Minnesota.

The amount referred to in paragraph III of the complaint, schedule No. 2, omitted earnings, $9,702.89, on which back taxes are claimed of $504.47, which said amounts constitute the totals on schedule No. 2 of the schedules annexed to the complaint is made up of the following earnings: Said omitted earnings, namely $9,702.89, are earnings derived by the company from the following express shipments: (*a*) Shipments received by an express company from a shipper at a point of origin outside of the state of Minnesota addressed to and destined to a consignee within the state of Minnesota; or (*b*) shipments delivered to an express company by a shipper in the state of Minnesota and addressed to and destined to a consignee without the state of Minnesota; or (*c*) shipments delivered to an express company by a shipper without the state of Minnesota and ad-

dressed to and destined to a consignee without the state of Minnesota, passing through the state of Minnesota in transit, as to all of which said shipments, either in class *a*, class *b*, or class *c*, the defendant received said shipments at a point in the state of Minnesota and forwarded them over its lines to a second point within the state of Minnesota, the transportation while in the hands of the defendant being performed wholly within the state of Minnesota. The transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant.

Each of said shipments which constituted said amount of
27 $9,702.89 in schedule No. 2 of paragraph III of complaint was made upon a through rate and a through waybill and bill of lading showing the origin and ultimate destination thereof, and consisted of a single transportation transaction commencing with the delivery by the shipper to an express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed.

The method by which money orders referred to in schedules 3-*a* and 3-*b* of paragraph III of the complaint and in schedules 3-*a* and 3-*b* annexed to the complaint were sold and redeemed, is as follows:

Upon receipt from the purchaser of the amount for which the money order is payable plus the fee charged by the defendant for issuing the money order, the agent of the United States Express Company fills out and delivers to the purchaser a money order of the form attached and marked "Exhibit 2." Said money order contains no indication of the point at which the money order is to be paid and the defendant or its agent has no knowledge of the place at which said money order is to be redeemed. It is in fact, redeemable in practically every town or city in the United States, Canada, Europe and other foreign countries. The money received by the agent of the company becomes a part of the money on hand at the office of said agent. The agent reports to the company the receipt of this money. The money goes into the general fund on
28 hand with the agent and the agent accounts to the company only for the balance of his receipts and disbursements, the money or receipts from the sale of money orders becoming mingled with the other items of receipts and disbursements in forming the general balance. This general balance of the agent's office may be a credit or a debit balance, depending upon the nature of the business at said office.

Eighty per cent of the money orders issued are returned through banks and clearing houses direct to the main office of the United States Express Company in New York City. Of the balance, a part are presented at various offices of the company throughout the United States and Europe, and upon presentation the amount for which the money order is payable is delivered by the agent of the defendant. The balance due upon money orders which have been issued and not yet paid constitutes a part of the general funds of the company held in bank in New York City. No part of the revenue

of the defendant from the sale of its money orders is paid to railroads or other transportation companies. No shipments of money are included in or connected with the sale and redemption of a money order.

Since the enactment of the statute whereby the state of Minnesota has been and is collecting as a tax a fixed percentage of the earnings of Express Companies, the officials of the State have never claimed, or collected, and do not now claim a tax or percentage of the
29 revenue derived by the Express Companies upon shipments of express matter which are (*a*) shipped from a point within the state of Minnesota destined to a point without the state of Minnesota; or (*b*) shipped from a point without the state of Minnesota destined to a point within the state of Minnesota; or (*c*) shipped from a point without the state of Minnesota destined to a point without the state of Minnesota where the Express Company receiving the revenue on any of said three classes of interstate shipments has performed the transportation service, both within and without the state of Minnesota. During said period no express company has paid, as a tax, a percentage of its earnings to the state of Minnesota upon such interstate business.

A copy of the report filed by the defendant with the Auditor of State and the Public Examiner for the twelve months ending December 31, 1909, is attached marked "Exhibit 3."

GEORGE T. SIMPSON,
Attorney General;
GEORGE W. PETERSON,
Assistant Attorney General;
DAVIS, KELLOGG & SEVERANCE,
Attorneys for the Defendant.

STATE OF NEW YORK,
County of New York, ss:

J. L. Tate, being first duly sworn, deposes and says that he is General Auditor of the United States Express Company, de-
30 fendant in the above entitled action; that he has read the foregoing stipulation and knows the contents thereof, and that the same are true.

J. L. TATE.

Subscribed and sworn to before me this 6th day of August, 1910.

[SEAL.] WILLIAM W. COLLINS, JR.,
Notary Public, New York County, New York.

My commission expires March 30, 1911.

EXHIBIT 1.

Articles of Agreement and Association, made and concluded this twenty-second day of April, one thousand eight hundred and fifty-four, by and between Danford N. Barney, Elijah P. Williams, James McKaye, Ashbel H. Barney, and Thomas M. Janes and

others, their associates, whose names are hereunto subscribed, witnesseth; That the persons above named, and others, parties to these presents, have severally agreed, and do hereby severally and mutually covenant and agree, to form a joint stock company, with the intent and purpose of doing and prosecuting a general express forwarding, agency, commission, banking, exchange and insurance business, at and between the City of New York, and such other cities and towns in the United States, the Canadas, or other foreign countries, as the directors, hereinafter named, or their successors, may, from time to time, direct, upon the terms, stipulations and agreements in these articles of association and agreement set forth
31 and specified.

The name of this association and joint stock-company shall be the "United States Express Company," and said association and this agreement shall continue in full force for and during the term of ten years, from the first day of May, A. D., one thousand eight hundred and fifty-four, unless sooner dissolved by law or a vote of the directors, as is hereinafter specified.

ARTICLE 2. The capital stock of the said Joint Stock Company shall consist of five thousand shares, valued at one hundred dollars each, it being hereby, however, expressly understood that the number of shares constituting the capital stock of said Company may be, from time to time, increased or decreased whenever the Board of Directors may deem it for the best interests of said Company, and shall so direct by a resolution of the Board.

Said shares shall be represented by proper certificates or scrip, in which shall be specified the number of shares to which the holder is entitled, and that each share is subject to assessment for any losses, damages or expenses to which the Company may be subjected in the prosecution of its legitimate business. Said scrip shall also contain a stipulation and agreement constituting each and every assignee thereof a member of said Joint Stock Company, subject to all the liabilities and entitled to all the benefits of any other member thereof, accruing from and after the date of such assignment, as fully and completely as signing these presents would do. It being hereby expressly understood and agreed by and between the
32 parties to these presents, that such shall be the import and effect of any and every assignment of the scrip of said Company. Said certificates shall be signed by the President and Secretary of said Joint Stock Company, and countersigned by the Treasurer thereof.

The shares in said Company shall be assignable in the usual form, either in person or by attorney, but no transfer shall be valid and so as to discharge the assignor from subsequent liability as a member of said Company until entered upon the stock-book, to be kept by the Treasurer thereof, and the assigned scrip surrendered. And it is hereby further expressly understood that an assignment by any member of this Association of the whole or any number of shares in said Company, shall not discharge him from any liability arising previous to the date of such transfer upon the books of the Company.

ARTICLE 3. And the joint associates, parties to these presents, do

further hereby mutually covenant, promise and agree, to and with each other, and each for himself and his legal representatives, to and with all the others, doth hereby covenant, promise and agree to pay and fully discharge any and all assessments which the Directors hereinafter named are authorized to make, and which they may at any time hereafter make, in accordance with the provisions herein contained; and further, that in case of the refusal or neglect of any shareholder in this Association to pay and discharge any assessment or assessments herein authorized, whenever the same shall be
33 called for by the Board of Directors, the whole or so many of his said shares and the property and value thereby represented, as may be requisite to pay such assessment or assessments, may be forfeited and sold; and the said Board of Directors are hereby especially authorized and empowered to forfeit and advertise and sell the same as is hereinafter provided. It being however further hereby expressly understood and agreed that said Board of Directors may, at their option, prosecute a suit at law for any and every such assessment or assessments.

ARTICLE 4. The property, business and good-will of the joint stock company hereby constituted shall be vested in, controlled and managed by a board of five directors, each of whom shall be the owner and holder in his own right of at least one hundred shares therein, to be chosen by the shareholders, as is herein provided; and Danford N. Barney, Elijah P. Williams, James McKaye, Ashbel H. Barney and Thomas M. Janes shall constitute the first Board of Directors, and they are hereby chosen and appointed each and every of them such directors to hold their offices for and until others shall be chosen in their stead, as is herein provided. It being however hereby expressly understood and agreed that in case of a vacancy occurring in said Board by death, resignation or otherwise, prior to a call for an election by the stockholders, the same may be filled by said Board of Directors, who may elect by ballot any stockholder eligible under the provisions herein contained.

34 Said Board of Directors shall also elect by ballot from their own body a President, Vice-President and Secretary, who shall hold their offices for one year and until others are chosen in their places.

ARTICLE 5. Whenever any number of shareholders in said Association, being the owners and holders of two-thirds in amount of the shares of said Company, shall unite in a written request for an election of one or more Directors and shall present the said written request for an election to the Secretary, it shall be the duty of said Secretary to call a meeting of the shareholders for the purposes of such election by a notice of at least sixty days, stating the time and place of said meeting. The manner of serving said notices shall be prescribed by the Board of Directors, who shall also appoint proper inspectors of such elections and prescribe all other needful rules and regulations appertaining thereto. Said elections shall be by ballot and each shareholder shall be entitled, either in person or by proxy to as many votes as he owns shares in said Association.

ARTICLE 6. The business and scope of the Association and Joint Stock Company hereby formed, shall be the purchasing, receiving, insuring and forwarding on commission, and for hire or otherwise, of money, bullion, gold and silver coin, bank bills, drafts, bills of exchange or other property, things or freights not by law prohibited; and such other express, forwarding, commission, exchange, banking and agency business as is usually done by express
35 companies, or other brokers and commission merchants, or as may be deemed expedient, and from time to time determined and directed to be done by resolution of the Board of Directors of said Company.

ARTICLE 7. And with the intent and for the purpose of transacting the various operations and business in the last above article specified and mentioned, said company shall have power and is hereby authorized to purchase, hire, rent, own and hold all requisite real and personal estate, lots of land, buildings, storehouses, offices, railway cars, steamboats, vessels, wagons, carriages, sleighs and horses, together with all property, conveniences or other things requisite in the judgment of the Directors, for carrying on and transacting the business herein specified and hereby authorized.

ARTICLE 8. The Directors of the Joint Stock Company and Association hereby constituted, or a majority of them, shall and they are hereby authorized and empowered to direct, manage and control the whole property, business and affairs thereof, and to do or cause to be done and transacted all and every the matters and things specified or referred to in articles sixth and seventh of these presents, and further to do and execute all and every authority, power and thing within the general scope, intent and purpose of this Association which might or could be legally done by the whole of the joint associates or co-partners, if present and acting. But it is hereby expressly understood and agreed that no Director herein named, or that may hereafter be elected, shall be concerned
36 or interested in any business or thing detrimental to the interests of said Company, or in opposition thereto, and especially shall no director use or employ the money, credit or name of said Company otherwise than in its legitimate business and affairs.

It being also hereby expressly understood and agreed that no shareholder in said Company other than such person or persons, Director or otherwise, as may be authorized by the Board of Directors, may or shall have the right or authority to use or sign the associate name of this Company, or the name of any firm belonging thereto, under any circumstances or pretext whatever.

Said Directors shall appoint a Treasurer of this Association and all such other officers, agents and servants thereof as they may deem requisite, and shall prescribe their occupations, powers, duties and compensations.

They shall also prescribe such general rules for the government of their own proceedings and such general duties and services to be by all or any one of themselves rendered in and about the business

of said Association as they may deem for the best interests thereof, and determine and fix the compensation to be paid therefor.

They shall also have power to declare dividends out of the net earnings of said Company, at such times and places as they may deem expedient.

They shall also have power and they are hereby authorized to execute any and all sealed powers or instruments which may be requisite and proper in the course of the business of said Company.

37 Said Directors shall also have power and they are hereby expressly authorized, from time to time, whenever in their judgment, it may be for the best interests of said Company, to change, alter and fix the number of persons that shall constitute the Board of Directors of said Company, and in case of an increase thereof or otherwise, to fill the vacancy thereby created, in the manner hereinbefore specified; provided, however, that no such change or alteration shall be valid unless made by a vote or written consent of at least two thirds of the whole number of existing Directors.

Said Board of Directors shall also have power, and they are hereby authorized in their discretion, to purchase, buy, sell or exchange any line or lines of express already established as well as to establish new lines and to run said lines and carry on the business thereof, so purchased or established under separate and distinct firm names or otherwise in the discretion of said Board.

Said Directors shall also have power and they are hereby authorized to assess the amount of the whole or any part of any loss or losses, damages or expenses which may happen or accrue in the course of the business of said Company, upon each and every one of the shareholders therein, in proportion to the number of shares held by each, of which said assessment said shareholder, or his legal representative, shall have at least thirty days' notice, and in case of refusal or neglect by any shareholder to pay such assessment at the exact time and place designated by said Directors in addition

38 to the remedies by law provided for the collection of such assessments, said Directors may, at their option, by resolution of the Board, forfeit the whole or any number of the shares belonging to such delinquent shareholder, and advertise and sell the same for the benefit of said Company.

Said Directors shall also have power and they are hereby authorized at any time whenever they may deem it for the best interests of said Company, by a unanimous resolution of the Board to dissolve said Company, and by themselves or their attorney or attorneys settle and adjust the business and affairs thereof.

They shall also meet together for consultation relative to the business of said Company, and shall cause to be kept a record of their proceedings and in all cases of a difference of opinion in reference to any matter of business requiring to be determined and settled, a majority shall govern and control.

Said Directors shall also cause semi-annual reports to be made and filed with the Treasurer or Secretary of said Company, containing a clear and succinct statement and exposition of the business and affairs

of said Company, showing its earnings and expenses, its profits and losses, as also its cash in hand, property, stock in trade and debts. Which said report, together with all books of account or other records of said Company, shall, at all reasonable times, be open to the inspection of any of the shareholders therein.

ARTICLE 9. All deeds of real estate, and all bonds and
39 mortgages, or other sealed instruments, made to and for the benefit of said Company, shall be made and executed to and by the President thereof and his successors, and all suits at law or in equity brought or prosecuted for said Company shall be in the name of the President thereof.

ARTICLE 10. And it is further hereby mutually understood, covenanted and agreed by and between the parties to these presents, and they severally each for himself and his legal representatives, to and with each and all the others, promise, covenant and agree, that in case of the death or legal incapacity of any or either of them, or of any number less than a majority in interest of the whole, prior to the termination of this Company, as fixed in these articles, such death or legal incapacity shall not operate as a dissolution of said Joint Stock Company, nor shall its business be thereby suspended or affected, the surviving shareholders or those of them legally capable, being hereby expressly authorized and empowered by each and every of the parties hereto, to prosecute and transact the business of said Company in the same manner and under the same associate name and style as if no such death or incapacity had occurred. And it is further hereby mutually understood and agreed by and between the parties hereto and each for himself and his legal representatives, covenants and agrees to and with each and all the others, that in case of the death of any shareholder in said Company, the survivors may and shall have the right to purchase and take the interest and shares of said deceased shareholder by paying to his
40 legal representatives the actual value thereof at the time of his decease, to be determined by three disinterested persons to be mutually chosen by the parties interested, unless the heirs of such deceased shareholder shall be of age and legally competent to act and shall elect to retain and hold such share or shares in conformity with these articles.

In witness whereof, the joint associates have hereunto set their hands and seals the day and year first above written.

D. N. BARNEY,	2,300	shares.	[SEAL.]
ELIJAH P. WILLIAMS,	1,800	"	[SEAL.]
J. McKAYE,	500	"	[SEAL.]
A. H. BARNEY,	200	"	[SEAL.]
T. M. JANES,	200	"	[SEAL.]

Signed and sealed in the presence of:

T. B. MARSH.
C. F. CATHAM.

The undersigned member and co-partner in the Joint Stock Company known as the United States Express Company, hath prom-

ised and agreed and doth hereby mutually covenant, promise and agree, to and with each and all the other members of said Company, to amend the original articles of association and agreement constituting said Company, made and executed on the 22nd day of April, A. D. 1854, by adding thereto the following article, which said article, from the date hereof, shall have the same validity and force as said original articles:

Dated November 28th, 1859.

ARTICLE 11. Said Joint Stock Company shall be con-
41 tinued and remain in full force and virtue for the further term of twenty years from and after the first day of May, A. D. 1864, subject to all the provisions and agreements in said original articles of association contained.

And the Board of Directors of said Company shall have power, and are hereby authorized by an unanimous vote, further to extend said term from time to time, and to fix and limit the same as they may deem for the best interests of said Company.

And said Board of Directors shall also have power and they are hereby authorized upon the dissolution of said Company, or upon the expiration of the term of its existence, either by themselves or their authorized agent or attorney to settle up and finally adjust the business and affairs thereof.

Whereas, The term of existence of the United States Express Company, unless further extended, will expire on the first day of May, 1884, according to the provisions of Article eleven of the articles of association; and the Board of Directors all being present, unanimously deem it for the best interests of said Company to extend its term of existence for an additional twenty years; now therefore, under the authority vested in the Board of Directors by said articles of association and by said Article eleven thereof, it is unanimously

Resolved, That the articles of association of said Company made the 22d day of April, 1854, and the several amendments and
42 additions thereto, be, and they hereby are, further amended, by adding thereto the following article:

ARTICLE 12. Said Joint Stock Company shall be continued and remain in full force and virtue for the further term of twenty years from and after the first day of May, A. D. 1884, subject to all the provisions and agreements in the original articles of association contained and the amendments and additions thereto.

We, the undersigned, being all the Directors of the United States Express Company, having passed the above resolution at a meeting held this day, pursuant to a legal notice, hereby ratify and approve the same, and order it to be placed on file.

Dated at New York, this twenty-third day of January, A. D. 1884.

T. C. PLATT.
A. H. BARNEY.
DAN P. EELLS.
G. R. BLANCHARD.
CHAUNCEY H. CROSBY.

Whereas, The term of existence of the United States Express Company, unless further extended, will expire on the first day of May, 1904, according to the provisions of Article eleven of the articles of association; and the Board of Directors all being present, unanimously deem it for the best interests of said Company to extend its terms of existence for an additional twenty years; now, therefore, under the authority vested in the Board of Directors by said articles of association and by said Article eleven thereof, it is unanimously

43 Resolved, That the articles of association of said Company, made the 22d day of April, 1854, and the several amendments and additions thereto, be, and they hereby are, further amended, by adding thereto the following article:

ARTICLE 13. Said Joint Stock Company shall be continued and remain in full force and virtue for the further term of twenty years from and after the first day of May, A. D. 1904, subject to all the provisions and agreements in the original articles of association contained, and the amendments and additions thereto.

We, the undersigned, being all the Directors of the United States Express Company, having passed the above resolution at a meeting held this day, pursuant to a legal notice, hereby ratify and approve the same, and order it to be placed on file.

Dated at New York, this twenty-fourth day of September, A. D. 1903.

(Signed) T. C. PLATT.
L. C. WEIR.
JAS. C. FARGO.
FRANCIS LYNDE STETSON.
C. H. CROSBY.
FRANK H. PLATT.
EDWARD T. PLATT.

Endorsed: Filed Oct. 3, 1910. Matt Jensen, clerk, by G. A. Johnson, deputy.

44 STATE OF MINNESOTA,
District Court:

County of Ramsey, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

EXHIBIT 3.

Return of Gross Earnings of the United States Express Company Operating on the Following Railroads in Minnesota.

Chicago Rock Island & Pacific; Duluth and Iron Range; Chicago, Milwaukee and St. Paul (expired April 30, 1909).

For 12 months ending December 31, 1909.

This return to be sent to Minnesota Tax Commission and a duplicate to Public Examiner, State Capitol, St. Paul.

All information to be itemized by railroads.

Prescribed by the Public Examiner and approved by Minnesota Tax Commission, August 3d, 1909.

1.

Name of railroads over which this Co. operates.

Chicago, Rock Island & Pacific R. R. Co.; Chicago, Milwaukee & St. Paul Ry. Co. (Prior to May 1, 1909); Duluth & Iron Range R. R. Co.

2.

Earnings on express business done within this state... —93,180.62

3.

Earnings on exp. bus. which originates & terminates in Minn. but passes through other states en-route... *10,695.28

45 4.

Earnings on interstate transfer business..... *13,776.08

Name of railroads over which this Co. operates.

Chicago, Rock Island & Pacific R. R. Co.; Chicago, Milwaukee & St. Paul Ry. Co. (Prior to May 1, 1909); Duluth & Iron Range R. R. Co.

5.

Misc. Exp. Earnings..... 892.80

6.

Total of columns 2, 3, 4 & 4..... 94,073.42

7.

Deduct amount paid Railroad Cos. in Minn..... 48,701.81
*12,668.82

Name of railroads over which this Co. Operates.

Chicago, Rock Island & Pacific R. R. Co.; Chicago, Milwaukee & St. Paul Ry. Co. (Prior to May 1, 1909); Duluth & Iron Range R. R. Co.

8.

Balance 45,371.61

9.

Add earnings on money order business..... *6,319.20

Total gross earnings during the 12 months..... $94,073.42
Less paid railroads 48,701.81

Taxable balance 45,371.61

N. B.—The United States Express Company submits that the items marked above with a star (*) are not taxable. The
46 Statutes of the State of Minnesota do not provide that such earnings be taxed and such tax would be illegal and contrary to the Constitution of the United States. This information relating to these items is given under protest and solely to avoid threatened penalties.

STATE OF NEW YORK,
County of New York, ss:

Edward T. Platt, being duly sworn deposes and says, that he is the Treasurer of United States Express Company and that the statement of the gross earnings as stated herein is true and correct to the best of his *best* knowledge and belief, and that it embraces all of the earnings of said express company as defined by law.

(Signed) EDWARD T. PLATT.

Subscribed and sworn to before me this 1st day of January, 1910.

(Signed) R. H. MORGAN, JR.,
Notary Public, N. Y. County, N. Y.

Synopsis of Contracts with Railroad Companies doing business in Minnesota—show Basis of Payments.

Chicago, Rock Island and Pacific Railroad Company, 55% with minimum of $170 per mile per annum.

Duluth and Iron Range Railroad Company, 45%, $4,800 per annum minimum.

Chicago, Milwaukee & St. Paul Railway Co., 50%, contract expired April 30, 1909.

Endorsed: Filed Oct. 3, 1910. Matt Jensen, clerk, by G. A. Johnson, deputy.

47 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Findings of Fact.

This case came regularly on for trial before the Court without a jury, George T. Simpson, Attorney General and Geo. W. Peterson, Ass't Attorney General appearing as attorneys for the State, and Davis, Kellog & Severance as attorneys for the defendant. Upon the pleadings and the stipulations of the parties, the Court finds as

Facts

That the allegations of paragraph 1 of the complaint are true.

That the items mentioned in schedule 4 of said complaint and described as omitted earnings were all earnings on intrastate express business handled by defendant between points in Minnesota during the calendar year 1899 and should have been taken into account in the assessment and levy and collection of taxes paid by defendant for said year 1899 but were omitted from the return of defendant for said year and were omitted from all computation in determining the taxes to be paid by defendant for said year and that no taxes were paid on account thereof.

That prior to the bringing of this action plaintiff demanded payment of the amount claimed to be due on account of the omitted gross earnings mentioned in the complaint and that defendant has refused to pay any part thereof.

That the items of paragraph 4 of the answer, from the beginning thereof through and including the words "points outside the
48 state of Minnesota" are true.

That the State Auditor during the years from 1899 to 1909, inclusive, ascertained the gross earnings of the defendant based upon the returns of the defendant and that drafts for taxes drawn pursuant to said returns were duly paid. That said returns did not nor did said taxes include or take into account the gross earnings of the defendant herein mentioned.

That the further material facts in this case are embodied in the stipulation of facts presented to the Court which is filed herewith and made a part hereof.

As conclusions of law the Court finds that plaintiff is entitled to judgment for the sum of $9,719.66, together with costs and disbursements of this action.

Dated at St. Paul, October 3, 1910.

OSCAR HALLAM,
District Judge.

Memorandum.

A constitutional amendment, passed in 1896, authorized what is known as a gross-earnings tax upon express companies. The state legislature, at its next session in 1897, passed an act providing for a three per cent gross earnings tax. (Chap. 309, Laws of 1897.) The percentage has been increased from time to time until it is now six per cent. (Revised Laws, 1012 to 1019.) The law has at all times provided that each express company should annually
49 make and file with the State Auditor a statement showing, among other things:

The entire receipts for business done within this state, including its proportion of gross receipts for business done by said company within this state in connection with other companies.

A statement of the amount actually paid by such express company for the year to the railroads within this state for the transportation of its freight within this state.

The entire receipts of the company for business done within this state after deducting the amounts paid for transportation of freight (section 1013).

The Auditor then determines the gross receipts of the company by deducting the amount paid by it for transportation of freight from its entire receipts for business done within the state and assesses a tax of six per cent "upon its gross receipts for business done between points within this state," which sum "shall be in lieu of all taxes upon its property."

Ever since the passage of Chapter 309, Laws of 1897, defendant company has been making annual statements and the Auditor has been making annual levies of taxes under said act, and the taxes as levied have been paid. The State now claims that items of earnings proper to be included have been omitted from each annual statement and levy from and including the year 1899 to the present time, and this suit is brought to recover the lawful percentage thereof. These items will be taken up in order.

50 First. The first omitted item consists of earnings on through shipments consigned at a point in Minnesota to another point in Minnesota but forwarded over lines of railroad partly without the state of Minnesota. About ninety-one per cent of this mileage is in Minnesota. The location or character of the portion of the route outside of the state does not appear.

It is argued by defendant that this is a tax upon interstate commerce. The contrary is distinctly held in Lehigh v. Pennsylvania, 145 U. S. 192. The earnings in question there were upon shipments consigned from Mauch Chunk, Pennsylvania, to Philadelphia via Trenton, New Jersey, in the precise manner of the shipments involved here. It is true the taxation was apparently confined to mileage wholly within the state of Pennsylvania, but that was not the determining point in the case. The case turned upon the question whether the tax upon the earnings of a through shipment of this character was a tax upon interstate commerce. If so, the tax was concededly void. But the Court held that it was not, and the tax was sustained.

This case was distinguished in Hanley v. Kansas City Southern Railway Company, 187 U. S. 617, as applying to taxation and not to regulation of transportation, but its authority was not questioned. The case of State v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 40 Minn. 267, cited by defendant, like the Hanley case, was a case involving the right of regulation of transportation.

51 It is to be observed too that the route involved was 105 miles in Minnesota and 148 miles in Wisconsin over which the company was doing the ordinary business of a common carrier within the state of Wisconsin. And the Court there said, "There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this state but whose route incidentally at some point and for an inconsiderable distance should cross the line of the state." Upon the facts

here stipulated, the rule laid down in Lehigh v. Pennsylvania, (145 U. S. 192, above cited) must be held to apply.

The second item is what is designated "interstate transfer business," that is, earning on interstate shipments received by defendant at a point in Minnesota and carried over its lines to a second point in Minnesota, the transportation while in the hands of defendant being performed wholly within the state of Minnesota, the transportation of such shipments while out of the state and also within the state but beyond defendant's lines being performed by other connecting companies.

To determine whether a percentage of earnings on such shipments may be exacted, we must first determine the nature of this tax. If it is a tax upon commerce, this item cannot be included. It is not competent for the state to tax the subject-matter of interstate commerce nor to tax any part of the earnings from interstate commerce even though earned wholly within the state. On the other hand, if the tax be a tax upon the property of the company
52 in this state, it is perfectly competent for the state to compute the value of the property or the amount of the tax on a basis of a percentage of, either any part, or the whole, of the receipts from interstate commerce earned within the state.

In my judgment this is a tax upon the property of the defendant company.

It is a substitute for all other forms of taxation of its property. This is significant. As said in McHenry v. Alford, 168 U. S. 651, 671, "when it is said as it is in this act that the taxes collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility, that a tax levied under such circumstances and by such methods was not in reality a tax upon gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of the gross earnings."

This feature of the law clearly distinguishes this case from Railway Co. v. Texas, 210 U. S. 217, where it appeared that there was "another tax on the property of the railroad * * * upon a valuation of that property as a going concern" (p. 227).

If this is not a tax upon property, then the property of express companies is not taxed at all. The legislature can hardly have intended such a result.

At the time of the passage of this act there was no constitutional authority for the imposition of gross earnings taxes upon any
53 other theory, and it is at least doubtful whether it was valid on any other theory than a tax upon property. (State v. Lakeside Land Co., 71 Minn. 283.)

The act providing for this tax was passed on the same day and pursuant to the same constitutional amendment as the gross earnings tax upon telephone companies (Chapter 314, Laws 1897), which has been held to be a tax upon property. It was manifestly part of the same general scheme of taxation.

It is true the title of the act used the term "Taxation of Express Companies" and the Code uses the term "Tax upon its gross receipts" (Sec. 1019). This latter language was not in the original act, but in any case such language is not decisive. The constitutional amendment above mentioned likewise uses the term "Tax * * * upon the earnings," though clearly intending a tax upon property computed on the basis of a percentage of earnings, and this is common usage of the term.

In State v. Canada Cattle Car Company, 85 Minn. 457, the act under consideration provides for a tax "in the nature of an excise tax or license." And even this was held to be in effect a tax upon property.

From the history of this form of taxation, and the circumstances of the passage of this act, it is fair to assume that the tax imposed was designed to be of the same character as the tax for many years imposed in case of railroad companies, the tax authorized by the Constitutional amendment of 1896, and the tax imposed in the
54 case of telephone companies, that is, a substituted form of taxation upon the property of the company.

The language of the court in State v. Northwestern Telephone Ex. Company, 107 Minn. 390, 398, is clearly applicable here. It is there said:

"The gross earnings tax provided for by the Minnesota statutes is not a tax upon the right to carry on interstate commerce * * * the gross earnings tax is a system by which the amount of tax upon the property is determined by a method which has generally been found equitable and satisfactory. It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax but for the purpose of certainty was intended to change the method of computation. The amount required to be paid remains a tax upon the railroad property and not against the corporation."

The question is then not one of power but of the construction of the language of the act. The language of the act is broad enough to cover earnings of the character in question. The act provides that the Auditor shall impose a tax of six per cent upon gross receipts "for business done between points within this state." It would be reading into the act something not found there to construe this as applying only to business having a local commencement and destination. As said in State v. Northwestern Telephone Company, supra, "We cannot assume that the legislature intended to relieve the property from future taxation to the extent of its income from
55 interstate business which was an important element of its earning power."

It is argued that since the act requires a statement of receipts of the business done "within this state" and a deduction of the amount paid to railroads "within this state" and requires the Auditor to determine earnings from "business done in this state," that this contemplates only purely local traffic, but in this particular the act only

follows the language of the constitutional amendment. That language as used in the amendment is not so circumscribed.

In Pac. Express Co. v. Siebert, 142 U. S. 339, the Court construed similar language in a statute as relating only to receipts from intrastate commerce, but this case is cited in State v. Northwestern Telephone Exchange Co., supra, as one of a class which "proceed on the theory that any other construction would render the particular statute unconstitutional as an attempt to impose a tax upon interstate commerce," and further said, "when we consider the principles which seem to have controlled the decision of these cases, it is apparent that they do not require us to adopt the construction contended for."

The usual method of applying this substituted form of taxation is to exact a percentage of the whole of the earnings from interstate commerce earned within the state, that is, if the defendant carried goods from a point within the state to a point without the state, the common method is to exact a percentage of the proportion earned within the state, and the legislature has that power. The
56 claim of the state here is that the act does not go so far as that. The claim simply is that the law exacts a percentage of gross earnings on interstate traffic only when the defendant's line begins and ends within the state. That the act does so provide does not in any sense affect its character or validity. If the state has the power to exact a percentage of the earnings to the state line, it certainly has power to exact a percentage for a lesser distance and the defendant cannot complain that the state has not exercised its right of taxation to the full extent of its power.

Item No. 3 consists of earnings from issuance of money orders sold and issued by defendant at points in the state of Minnesota. Such money orders designate no place of payment. They may be redeemed at any office of the company. Eighty per cent of them are returned through banks and clearing houses to the main office of the defendant in New York. No part of the revenue from this source is paid to railroads or other transportation companies. No shipments of money are included or connected with the sale and redemption of a money order.

In my judgment, the state may recover its percentage on these items of earnings. The- constitute one of the regular and usual sources of revenue of this defendant. It is a matter of common knowledge that they constitute a regular and usual source of earnings of express companies generally. They are included in the "Gross Receipts," a percentage of which express companies
57 are required by statute to pay. It is true, express companies are defined by statute (Revised Laws 1012) and in the definition no mention is made of this feature of their business. This simply signifies that a company may be an express company without doing a money order business, but it does not signify that when an express company issues money orders its earnings therefrom are not part of its gross earnings within the meaning of the act. This

source of earnings must be taken into account within principles generally applied to gross earnings taxation.

State v. M. & I. R. R. Co., 106 Minn. 181.

In my judgment there is no distinction in this particular between money orders redeemed within this state and those redeemed elsewhere. Business of this sort is not commerce, and money orders issued in this state and redeemed outside of the state are not interstate commerce.

In Nathan v. Louisiana, 8 How. 73, it was held that a tax imposed by a state upon all money or exchange brokers is not void as a regulation of commerce. The Court said, "The individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income as other persons are taxed, or in the form of a license. He is not engaged in commerce but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on."

58 The fourth item relates to the percentage upon omitted items of earnings for the year 1899. It is contended that the omitted taxes cannot now be collected because the omitted earnings were never included in any assessment or levy, and that "the state having once assessed the company for that year, it cannot, at any later date, come forward with additional claims." This question was determined, impliedly at least, in State v. M. & I. R. R. R. Co., 106 Minn. 176, and State v. Northwestern Telephone Exchange Co., 107 Minn. 390. Recovery was allowed in each of those cases under the same conditions as exists here.

The taxes for the year 1899 are not outlawed. The law required the State Auditor to determine the gross receipts of every such company for 1899, between March 1st and April 1, 1900 (Revised Laws, 1015). On or before March 15, 1900, the Auditor was required to assess upon each company a tax upon its gross earnings for 1900, and to draw a draft upon the company therefor (Section 1090). The statute of limitation does not commence to run until the cause of action accrues. The cause of action here could not accrue as to taxes assessed until the assessment was made, nor as to omitted taxes until the time for making the assessment. The assessment could not possibly be made under the law before March 1, 1900, and was not required before March 15, 1900.

In 1900 the statute of limitations on the right of the state to recover taxes was six years. The state had a subsisting cause of action

59 up to March 1, 1906. Giving the defendant the benefit of every possible argument, it must be held that the claim was not outlawed on that date. Now, on that date, the Revised Laws went into effect. Section 980 provides that "there shall be no limitation of time upon the right of the state to provide for and enforce the assessment and collection of taxes upon all property subject to taxation." This abrogated the statute of limitations as applied to this case.

This provision of the code was a re-enactment of a provision orig-

inally enacted in 1902 (Chapter 2, Laws, Special Session, 1902, Sec. 82). It is urged that the 1902 act could not apply to taxes of this character because its title related only to taxes upon real estate and that the same restriction adheres to the provision after its incorporation into the code. The first proposition may be correct, but the second is not; that is, as enacted in 1902 the general language may have had a limited application by reason of the restricted language of the title of the act, but after the provision was reenacted in the code under an appropriate general title, the restriction by reason of the title to the original act no longer existed, and all of its language was operative from the time the revision took effect.

State v. Barnes, 108 Minn. 230, 233.

HALLAM, *J.*

Endorsed: Filed Oct. 3, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

60 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the foregoing and proposed case contains all of the evidence introduced and offered at the trial of the above entitled action by the respective parties thereto, the decision of the Court, and exhibits numbered 1, 2 and 3, offered upon the trial of said action, and the same may be allowed as and for the settled case in said action.

Dated October 13th, 1910.

GEO. T. SIMPSON,
GEO. W. PETERSON,
Attorneys for Plaintiff.
DAVIS, KELLOG & SEVERANCE,
Attorneys for Defendant.

Endorsed: Filed Oct. 13, 1910. Matt Jensen, Clerk By G. A. Johnson, Deputy.

I hereby certify that the foregoing and attached proposed case contains all the evidence introduced and offered by the respective parties to the above entitled action, all objections, rulings and exceptions in connection with the introduction of said testimony, Exhibits 1, 2 and 3, offered on the trial of said action, and all other proceedings

had on the trial of said action; and I hereby settle and allow the same as and for the settled case herein.

Dated this 13th day of October, 1910.

OSCAR HALLAM.
District Judge.

Endorsed: Filed Oct. 13, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

61 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Judgment.

Pursuant to the findings and order for judgment duly made and filed in the above entitled action on the 13th day of October, A. D. 1910.

Now, on motion of George T. Simpson, said attorney general,

It is hereby adjudged, that the plaintiff herein recover of said defendant, United States Express Company, the sum of nine thousand seven hundred nineteen and 66/100 dollars, damages, with costs and disbursements to be taxed.

Signed this 13th day of October, A. D. 1910.

MATT JENSEN, *Clerk,*
By G. A. JOHNSON, *Deputy.*

Endorsed: Filed Oct. 13, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

62 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

Notice of Appeal.

You will please take notice, that the above named United States Express Company appeals to the Supreme Court of the State of Minnesota, from the judgment of this Court in this action, entered on the 13th day of October, 1910.

Dated Oct. 13, 1910.

DAVIS, KELLOG & SEVERANCE,
Attorneys for Defendant.

To Geo. T. Simpson and Geo. W. Peterson, Attorneys for Plaintiff, and Matt Jensen, Clerk of the District Court.

Due service of the within notice at St. Paul this 13th day of October, A. D. 1910, is hereby admitted and bond on appeal is hereby waived.

GEO. T. SIMPSON,
GEO. W. PETERSON,
Attorneys for Plaintiff.
MATT JENSEN,
Clerk Dist. Court.

Endorsed: Filed Oct. 13, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

63 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
UNITED STATES EXPRESS COMPANY, Defendant.

(Here follows fac-simile of money order.)

Endorsed: Filed Oct. 13, 1910. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

(705 X 1178)

AGENTS STUB

Ak 00000

AMOUNT OF ORDER $_____

CHARGES ..... $_____

TOTAL ..... $_____

ORDER OF _____ _____

AT _____ DATE _____ 19____

SOLD TO _____

SETTLEMENT OF ORDERS SOLD AND PAID SINCE LAST REPORT

AT _____ OFFICE

TOTAL AMOUNT OF _____ ORDERS SOLD $_____

CHARGES, LESS COMMISSION (IF ALLOWED) $_____

TOTAL ..... $_____

TOTAL AMOUNT OF _____ ORDERS PAID $_____

BALANCE DUE _____ $_____

REPORT SENT TREASURER _____ 19____

50 NOT PAYABLE ... FIFTY DOLLARS. 50

40 NOT PAYABLE ... FORTY DOLLARS. 40

30 NOT PAYABLE ... THIRTY DOLLARS. 30

20 NOT PAYABLE ... TWENTY DOLLARS. 20

10 NOT PAYABLE ... TEN DOLLARS. 10

5 NOT PAYABLE ... FIVE DOLLARS. 5

WHEN C

BY A

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PAY TO TH

THE SU

COUNTERS

ISSUED A

DATE

UNITED STATES EXPRESS CO. MONEY ORDERS

Are sold at all agencies of the Company at any business hour, and are accepted everywhere in United States, Canada and Europe.

40 NOT PAYABLE FOR MORE THAN FORTY DOLLARS.
30 NOT PAYABLE FOR MORE THAN THIRTY DOLLARS.
20 NOT PAYABLE FOR MORE THAN TWENTY DOLLARS.
10 NOT PAYABLE FOR MORE THAN TEN DOLLARS.
5 NOT PAYABLE FOR MORE THAN FIVE DOLLARS.

WHEN COUNTERSIGNED
BY AGENT AT POINT OF ISSUE

EXPRESS MONEY ORDER

Ak 00000

The United States Express Company

AGREES TO TRANSMIT AND

Exhibit 2

DOLLARS | CENTS

PAY TO THE ORDER OF _____

THE SUM OF _____ 100 DOLLARS

NOT GOOD FOR MORE THAN THE HIGHEST PRINTED MARGINAL AMOUNT IN NO CASE TO EXCEED FIFTY DOLLARS.

SAMPLE NOT GOOD

COUNTERSIGNED

_____ AGENT.

E J Hart
TREASURER

ISSUED AT

_____ STATE OF _____

NAME OF REMITTER

DATE _____ 19____

ANY ERASURE, ALTERATION DEFACEMENT OR MUTILATION OF THIS ORDER RENDERS IT VOID

Ak 00000

U.S.EX.CO.
MONEY ORDER.
REMITTER'S RECEIPT.
KEEP IT.

$ _____
SENT TO

_____

BY

_____

DATE _____ 19____

REMITTER WILL KEEP THIS RECEIPT TO SECURE REFUND OF AMOUNT OF ORDER IF LOST BLANK SPACES ARE FOR USE OF REMITTER AND WITH HIS SIGNATURE IN INK WILL PREVENT FRAUDULENT REFUND SHOULD THIS RECEIPT BE LOST.

WHEN SOLD TO BE CASHED IN EUROPE FILL IN SPACE NEXT BELOW.

Money Orders to be cashed in Europe will be paid to the person presenting same, whether such Orders are payable to the order of a particular person or not. Such orders are redeemable only with the banking firm in Europe indicated on the back of the Order, at the fixed rates of $4.90 for 1 pound sterling, 24¼ cents for 1 German mark, 19½ cents for 1 French, Belgian or Swiss franc, 19½ cents for 1 lire, 41 cents for 1 Hollandish guilder, 27¼ cents for 1 kronor, 19⅜ cents for 1 finmark, 52½ cents for 1 ruble, 20⅜ cents for 1 Austrian krone.

Payable at.....

By.....

Received Payment.

.....

At.....*State*.....

Date.....

No order drawn payable to bearer.

MEMORANDUM OF ORDERS PAID.

DATE PAID		NO. OF ORDER.	AMOUNT	

64 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Answer, Certificate, Complaint, Conclusion of Law, Findings of Fact, Judgment, Memorandum, Notice of Appeal, Reply, Stipulations, Summons, Exhibits 1-2-3, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 13th day of October, A. D. 1910.

[SEAL.]

MATT JENSEN, *Clerk,*
By G. A. JOHNSON,
Deputy Clerk.

65 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Assignments of Error.

Frank B. Kellogg, C. A. Severance, Robert E. Olds, Counsel for Appellant.

(Endorsed:) Filed Dec. 22, 1910. I. A. Caswell, Clerk.

66 1st. The court erred in holding that the State is entitled to judgment for the sum of $9,719.66, or any sum whatsoever.

2nd. The court erred in holding that the gross earnings of the appellant, derived from "Intermediate Business," so-called—that is to say, from express business transacted between points in Minnesota, where, however, the transportation involved passage through another state en route,—are subject to taxation.

3rd. The court erred in holding that the gross earnings of the appellant company, derived from "Interstate Transfer Business and Tonnage Revenue," so-called,—that is to say, earnings arising from express business transacted between points located on the appellant's lines in Minnesota, the originating or terminating point, however, of the shipments being located outside the State of Minnesota, on the line or lines of another express company, to or from which said business is transferred,—are taxable.

4th. The court erred in holding that the earnings of the appellant company, derived from the sale of money orders in Minnesota during the period covered by the complaint, or any part of such earnings, are taxable.

5th. The court erred in holding that the earnings of the appellant company, derived from the sale in Minnesota of money orders which were also redeemed within the State of Minnesota, are taxable.

67 6th. The court erred in holding that the various items of gross earnings derived from business transacted by the appellant company in the year 1899, are taxable and can be recovered in this action; the court should have held that the demand for taxes based upon said earnings for the year 1899 was, at the time of the institution of this action and also in February, 1907, barred by the Statute of limitations, as claimed in paragraph 7 of the answer.

7th. The court erred in holding that any of the items going to make up the total demanded in the complaint can be lawfully assessed and collected at this time or in this action; the court should have held that, the taxes having been duly computed, assessed, and paid in each of the years covered by the complaint, there was no authority, either in the State Auditor or in any other state official, to assess or collect any further tax for any or all of said years.

8th. The court erred in holding that the tax attempted to be imposed upon earnings from "Intermediate Business," so-called,—that is to say, upon earnings derived from the express business transacted by the appellant for the years 1899 to 1908, inclusive, between points in Minnesota, where, however, the transportation involved passage through another state en route,—did not constitute a burden upon interstate commerce, in violation of the Constitution of the United States; the court should have held that said business was interstate in character, and that the said tax sought to be imposed upon

68 the earnings therefrom was an unlawful interference with, and a burden upon, interstate commerce, and would deprive the appellant of its property without due process of law,—all contrary to the provisions of the Constitution of the United States.

9th. The court erred in holding that the tax sought to be imposed upon the earnings derived from "Interstate Transfer Business and Tonnage Revenue,"—that is to say, upon earnings arising from express business transacted between points located on the lines of the appellant in Minnesota, the originating or terminating point, however, of the shipments being located outside the State of Minnesota, on the lines of another express company, to or from which said business was transferred,—did not constitute a burden upon interstate commerce, in violation of the Constitution of the United States; the court should have held that said business was interstate in character, and that the tax sought to be imposed thereon was an unlawful interference with, and a burden upon, interstate commerce, and would deprive the defendant of its property without due process of law,—all contrary to the provisions of the Constitution of the United States.

10th. The court erred in holding that the tax sought to be imposed upon the earnings derived from the sale of money orders sold

in Minnesota, and redeemed outside of the State of Minne-
69 sota, was not a burden upon interstate commerce, in violation of the Constitution of the United States; the court should have held that said business was interstate in character, and that the tax sought to be imposed thereon was an unlawful interference with, and burden upon, interstate commerce, and would deprive the appellant of its property without due process of law,—all in violation of the provisions of the Constitution of the United States.

11th. The court erred in holding that the earnings of the appellant derived from the sale of money orders, whether redeemed within or without the State of Minnesota, were subject to taxation by the State; the court should have held that any attempt to tax the earnings derived from such business constituted an unlawful and improper discrimination against said business and against the appellant,—inasmuch as other persons, associations, partnerships and corporations transacting a similar business were not, and are not, similarly taxed in the State of Minnesota,—and that such tax upon said earnings was not equal and uniform, would deprive the appellant of its property without due process of law, and would amount to a denial of the equal protection of the laws,—all contrary to the provisions of the Constitution of the United States, and also contrary to the provisions of the Constitution of the State of Minnesota.

12th. The court erred in holding, as a matter of construction, that there was any warrant, statutory or otherwise, for taxing or imposing any burden upon the money order business transacted by the appellant, or the earnings from such business, during any of the time covered by the complaint.

FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
Counsel for Appellant.

70 16977.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Opinion and Syllabus.

Filed May 19, 1911. I. A. Caswell, Clerk.

BUNN, *J.:*

71 16977.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 2.

STATE OF MINNESOTA, Respondent,
v.
UNITED STATES EXPRESS COMPANY, Appellant.

Syllabus.

1. Carriage of shipments by an express company from a point in this state to another point in this state does not constitute inter-state commerce, even where the shipments are forwarded over a line of railroad that for a part of its route lies outside the state. A proportionate part of the earnings from such shipments based on the number of miles of the route within the state constitutes a part of the company's gross earnings upon which the state is entitled to assess taxes under Revised Laws 1905 Section 1019.

2. The state has a right — impose a tax upon property within its borders, regardless of the fact that such property may be employed by its owners in inter-state commerce.

3. The gross earnings tax provided by Revised Laws, Sections 1013 to 1019, is not a tax upon the earnings of express companies or upon the companies, or their right to engage in business, but is a tax upon their property within the state.

4. A tax upon the property within the state of an express company engaged in inter-state commerce, based upon its gross
72 earnings within the state on inter-state shipments, is not a regulation of or interference with inter-state commerce.

5. Receipts of an express company from the sale of money orders within this state are earnings of such company within the state,

whether such money orders are redeemed within or without this state, and should be included in the gross earnings of such company in estimating the tax upon its property within the state.

6. Revised Laws, Sections 1013 to 1019 as thus construed, do not violate either the constitution of the United States or the constitution of this state.

7. The right of the state to recover taxes on the property of defendant for the year 1899 did not accrue prior to May 1st, 1900, and was not barred March 1st, 1906, when the Revised Laws of 1905 went into effect.

8. Section 980 Revised Laws 1905 abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property within the state subject to taxation, including the property of express companies.

9. When earnings within the state for any year are omitted from the annual returns of the company, and not included in the amount of gross earnings upon which the taxes for such year were based, the state may recover taxes based on such omitted earnings in an action brought for that purpose.

Judgment modified.

73 16977.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 2.

STATE OF MINNESOTA, Respondent,
v.
UNITED STATES EXPRESS COMPANY, Appellant.

Opinion.

Defendant is an express company organized under the laws of New York, and doing business in this state and throughout the United States. This action was brought by the State to recover the sum of $9719.66, being taxes alleged to be due on account of gross earnings never reported by defendant. Defendant admitted that it had failed to include in its returns to the proper State officials the items of gross earnings on which the complaint alleged taxes were payable, and claimed that such items were not taxable.

A constitutional amendment passed in 1896 authorized a gross earnings tax upon express companies. The legislature in 1897, passed an act providing for three per cent tax upon the gross earnings of such companies. The rate was increased to 5% in 1899, and to 6% in 1901.

The statutes as they are now and were at the time the action was commenced, provide in substance that every express company shall annually between January 1st and February 1st, make and file with

the State auditor a statement which shall contain among
74 other facts, "The entire receipts * * * for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies." The auditor between March 1st and April 1st, determines the gross receipts of every such company, and on or before March 15th, "Shall assess upon each company a tax of six per cent upon its gross receipts for business done between points within this state for the preceding calendar year as determined by the auditor, which shall be in lieu of all taxes upon its property." Revised Laws 1905, Sec-. 1013, 1015, and 1019.

The facts were stipulated: The items of gross earnings which the company failed to include in its returns to the State Auditor, and which the State claims are taxable, are as follows:

First. Earnings on through shipments consigned from a point in Minnesota to another point in Minnesota, but forwarded over lines of railroad partly without the State of Minnesota. Ninety-one per cent of this mileage is in Minnesota. The amount of the back taxes claimed on these earnings is $2991.29, based upon the total earnings of such shipments, without any deduction based upon the portion thereof earned without the state.

Second. "Interstate transfer business," that is, earnings on inter-state shipments received by defendant at a point in Minnesota, carried over its lines to a second point in Minnesota, the transportation by defendant being performed wholly within the State, but the transportation of such shipments while out of the State and also
75 within the State but beyond defendant's lines being performed by other connecting companies. The amount of back taxes claimed on such earnings is $504.47.

Third. Earnings from the issuance of money orders sold and issued by defendant at points in Minnesota. These money orders designate no place of payment but are payable at any office of the company. Eighty per cent of them are returned through banks and clearing houses to the main office of defendant in New York. No part of the revenue from this service is paid to railroad or other transportation companies. No shipments of money are connected with the issuance and redemption of money orders. The amount of back taxes on the earnings derived from this class of business is $5788.15.

Fourth. Miscellaneous items not reported for taxation, representing omitted earnings on intra-state express business handled between points in Minnesota by defendant during 1899. The amount of back taxes on these earnings is $435.75.

The trial court decided for the State, holding that the earnings embraced in each of the four classes were taxable, and that plaintiff was entitled to judgment for $9719.66, the full amount claimed. Judgment was entered and defendant appealed.

We will consider the different classes of earnings separately in the order above stated.

1. Defendant claims that a tax upon these earnings is a tax upon inter-state commerce. We think that the case of Lehigh Valley R.

Co. v. Pennsylvania, 145 U. S. 192, is decisive against defendant's contention, at least as to the proportion of the earnings de-
76 rived from the carriage within this State. The facts in that case are substantially identical with the facts in this. As here, the point of shipment and the point of destination were both within the State; but the route passed through a portion of another State. It was held that this was not interstate commerce and that the state of the points of shipment and destination could tax earnings on such shipments. It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state, but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery.

Defendant also contends that the language of the statute shows it was not the intention of the legislature to tax such earnings. This contention is based upon the wording of the provisions that "the gross receipts from business done within this state" shall be returned by the company, and that the tax shall be assessed upon its "gross receipts for business done betwen points within this state." The intent of the legislature was clearly to avoid taxing interstate business, but we are unable to see how confining the tax to receipts from business done "between points within this State" indicates an intention to exclude from taxation, or more correctly speaking, to exclude
77 from measure of taxation, earnings "between points within this State" in cases where the shipments pass out of the state en route. To so construe the language would be to add a new term to the act.

2. So called "Interstate transfer" business. Carriage of shipments from points in this state to points without this state is undoubtedly interstate commerce, though the carriage without the state is wholly by connecting companies. There is no doubt that it was the intention of the legislature, as expressed in the act, to include this class of earnings within the state in the gross receipts upon which the tax is based. They are earnings from business done "between points in this State." The provision that there shall be included by the company in its return "its proportion of gross receipts for business done by such company within this state in connection with other companies" is not, we think, entirely colorless, but bears out the conclusion that the act shows an intent that the state shall be entitled to include such earnings in figuring the taxes to be paid by the company.

The question is whether the legislature had power to include earnings from such shipments. If the gross earnings tax law is to be construed as a tax upon gross earnings, admittedly a tax upon the earnings from interstate shipments is an interference with interstate commerce, but if such law does not authorize a tax upon gross earn-

ings, if it is a tax upon the property of the corporation within the state, its gross earnings within the state being merely a mea-
78 ure or method of arriving at the value of its property for taxation, it is equally clear that there is no interference with interstate commerce, and the legislature has not acted beyond its power.

There is nothing in the constitution or laws of the United States which forbids the state to tax property which is within its borders merely because it is employed in interstate or foreign commerce. State v. Northwestern Telephone Exchange Co., 107 Minn., 390; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18.

It has long been settled by the decisions of this court that the gross earnings tax laws were not intended to change the character of the tax, but for the purpose of certainty were intended to change the method of computation. The amount required to be paid remains a tax upon the property, and not against the corporation. The gross earnings tax is a system by which the amount of tax upon the property is determined. City of St. Paul v. St. P. & S. C. R. Co., 23 Minn., 469; County of Ramsey v. C. M. & St. P. Ry. Co., 33 Minn., 537; County of Todd v. St. P. M. & M. Ry. Co., 38 Minn., 163; County of Traverse v. St. P. M. & M. Ry. Co., 73 Minn., 417; M. & St. L. Ry. Co. v. Koerner, 85 Minn., 149; State v. Canada Cattle Car Co., 85 Minn., 457; State v. Northwestern Telephone Co., 107 Minn., 390.

It is true that this court has never construed this particular law, but we are not able to see why the decisions on the railroad tax laws and on the telephone tax law should not rule this case. It is
79 pointed out that the title to the act used the expression "Taxation of Express Companies", and that the Revised Laws uses the term "Tax upon its gross receipts", though this latter language was not in the act itself. But what the tax is called is not material. The act for this tax was passed on the same day and pursuant to the same constitutional amendment as the law providing for a gross earnings tax upon telephone companies, which was construed to be a property tax. It is quite clearly a part of the same general scheme of taxation—the system of using gross earnings as a method of arriving at the amount of the tax upon the property. The gross earnings system as applied to railroads had been in force many years at the time this constitutional amendment was adopted and when the laws were passed applying the system to telephone and express companies. The railroad tax laws had received the construction of the courts that the tax was not upon gross earnings, but on property. It seems fair to assume that the legislature had this construction in view and did not intend to tax the gross earnings of express companies, but did intend to extend a system of taxation that had proven satisfactory.

The decisions of this court, if followed, lead clearly to the conclusion that the law in question provides for a property tax, and is not therefore a tax upon interstate commerce when applied to the receipts for business within the state, though the shipments come from or go to a point outside the state. We do not feel justified in

departing from the doctrine of these decisions because of the
80 recent decisions of the United States Supreme Court relied on by defendant. It is by no means clear that the court has rendered any decision on the subject that is contrary to those of this court. The earlier cases established the principle that a tax upon the earnings from interstate commerce is an interference with such commerce, but do not hold that a gross earnings system of taxation cannot be construed as a tax upon property; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Philadelphia Southern S. Co. v. Pennsylvania, 122 U. S. 326; Ratterman vs. Western Union Co., 127 U. S. 411; Western Union Co. vs. Alabama, 132 U. S. 472. In Pullman v. Pennsylvania 141 U. S. 18, it was held that a tax upon the capital stock of the Pullman Company on a basis of assessing such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run, was, in substance and effect, a tax upon property. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, the state statute required railroad companies to pay an annual tax for the privilege of exercising its franchise in the state, the amount to be determined by the amount of its gross receipts. It was *rp*ovided that where a railroad lay partly within and partly without the state, the tax should be equal to the proportion of its gross receipts within the state, its amount to be determined by dividing the gross receipts of the company by the total number of miles operated, thus ascertaining the average gross receipts per mile, and then multiplying the result by the number of miles operated within the state. It was held that this was not a tax upon gross receipts, but resort to the receipts was to obtain a guide to a reasonable conclusion as to the amount
81 of the excise tax which should be levied. The law was held not to be a regulation of interstate commerce.

Statutes applying similar methods of taxation to telegraph companies and to express companies have been sustained, as essentially property taxes, and not an interference with interstate commerce. Western Union Co. v. Taggart, 163 U. S., 1; Adams Express Co. v. Ohio, 165 U. S. 194. In McHenry v. Alford, 168 U. S. 651, where the court had under consideration a railroad gross earnings tax law of the territory of Dakota, though the question of interference with interstate commerce was not decided, Mr. Justice Peckham clearly intimates that the act was not a tax upon gross earnings, but provided a different method of taxation upon the property of the company. His language is in point: "Where it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

In Galveston etc. Ry. Co. v. Texas, 210 U. S. 217, a gross earn-

ings tax law of Texas was held to violate the commerce clause of the constitution. The majority of the court, speaking through Mr. Justice Holmes, while expressly stating that "By whatever name it may be called, if it amounts to no more than a tax upon property
82 or its just equivalent such a law is not open to attack as inconsistent with the constitution," holds that the act there in question was not a property tax, but a direct tax on gross receipts. Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, is followed, and Maine v. Grand Trunk Ry. Co. distinguished. The Galveston case is really the only utterance of the United States Supreme Court that appears at all inconsistent with the cases in this court holding that the gross earnings tax is a tax upon property, and even here the doctrine is fully recognized that some gross earnings tax laws should be so construed. The act under consideration in the case at bar is we think fairly distinguishable from the act considered in the Galveston case. Our constitution, under which the act was passed, authorizes the imposition of a tax "upon the property within the state" of express companies, by taxing the gross earnings. The act provides that the tax "shall be in lieu of all other taxes upon the property of any express company * * * paying the same."

Giving due weight to the cases of the Supreme Court referred to and others we have not referred to, taking into consideration the language of the constitutional amendment and of the act itself, viewed in the light of the construction that had been placed upon the railroad tax laws before this act was passed, we feel that no other course is open but to adhere to our former decisions.

3. Receipts from money orders sold by defendant at points in Minnesota. This item is divided into earnings on money orders redeemed without the state, and those redeemed within the state. It can not be seriously claimed, and we do not understand defendant to claim, that taxation of these earnings violates the com-
83 merce clause of the constitution. Nathan v. Louisiana, 8 How. 73.

The fees for all money orders issued within the state are paid in this state. The orders are redeemable at any office of the company within or without the state. No transportation of money is involved. As far as the validity of the tax is concerned, there seems to be no material distinction between the orders that are redeemable within Minnesota and those redeemed elsewhere. The company is engaged in a banking business in the state, the earnings from which are not taxed at all unless under this act.

It is argued by defendant that to the extent that defendant is engaged in business other than the express forwarding business it cannot be regarded as an express company within the meaning of the statute. The statute defines an express company as a corporation that is engaged in the business of conveying articles by express, but it by no means follows that a corporation that is also engaged in other business is not still an express company, and liable to pay taxes on the property used in such other business. It was and is a well known fact that express companies sell and redeem money orders. Defendant's charter authorized it to do a banking and exchange

business. No reason is apparent why the legislature should exempt from taxation the property employed in such business. The statute does not confine the tax to earnings from transportation. It says that the company shall return a statement of its "entire receipts
for business done within this state"; that the auditor shall
84 determine the "gross receipts of such company", and shall
assess a tax upon its gross receipts for business done between points within this state. We think that the selling of money orders within the state is business done within the state, within the fair meaning of the language of the act.

The point is made that taxing these receipts violates the provisions of the Federal Constitution and the State Constitution requiring that taxes must be uniform and levied without discrimination, and guaranteeing the equal protection of the laws and due process of law. The argument is that the classification is unreasonable and arbitrary, in that the receipts from similar business carried on by others than express companies are not taxed. We are not willing to grant the truth of the premise. It is true that receipts from the sale of exchange by banks are not taxed directly, but the system of taxation applied to banks is not the gross earnings system, and it is not right to say that a bank pays no tax on the receipts from its exchange business, or upon the property used in that business. Defendant points out the similarity in this respect between this case and the corporation tax case decided by the Supreme Court of the United States since its brief and argument in this case were made. As that decision upholds the validity of the corporation tax law it is needless to discuss further the constitutional objections urged here by defendant. We hold that the state was entitled to assess a tax upon the receipts from defendant's sale of money orders within the state.

4. Miscellaneous items of earnings in 1899 not reported
85 for taxation. The only point urged here is that the statute
of limitations bars a recovery of these items. This point applies also to the taxes for 1899 included in the previously considered items. The act provided that the auditor shall make the assessment on or before March 15th of each year upon the gross receipts for the preceding year, and shall deliver to the State Treasurer for collection, a draft upon the company for the amount assessed. The company has 60 days after demand by the State Treasurer in which to pay the tax before any penalty accrues. It is clear in our opinion that no cause of action accrued to recover these taxes until 60 days after demand by the State Treasurer, which would be May 1, 1900, at the earliest. State v. Sage, 75 Minn., 448; R. L. 1905, Sec. 4071. At this time the limitation was six years, but before this six years expired, on March 1st, 1906, the revised laws of 1905 went into effect. Section 980 of the revised laws abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property subject to taxation. Defendant argues that section 980 is merely a re-enactment of section 82, Ch. 2, special laws of 1902, which according to the title of the chapter, concerned only the taxation of real estate, but the title was omitted and

the body of section 82 incorporated in the revision as a general provision under Chap. 11, entitled "Taxes." Section 980 is not now subject to the limitations in the original title to chapter 82. State v. Barnes, 108 Minn., 230. Defendant's contention that Sec. 980 relates only to the assessment of taxes upon property as such,
86 and not to a tax based upon gross earnings is not substantiated by the language of that section, which is clearly broad enough in its terms to include all taxes due the state. As we have held in this and in many other cases, a gross earnings tax is a tax upon property. We hold that section 980 does apply to gross earnings taxes, and that there is no limitation of time upon the right of the state to enforce collection of such taxes.

5. Defendant makes the further point that none of the omitted earnings can now be taxed, or the taxes now collected, for the reason, that no provision is made in the laws for making a re-assessment or a subsequent assessment on omitted earnings. It would be manifestly wrong if this power did not exist, and we are of the opinion that it does. Sec. 1585 R. L. 1905. The cases of State v. Minnesota and International Ry. Co., 106 Minn., 176, and State v. N. W. Telephone Exchange Co., 107 Minn., 390, were brought to recover taxes on omitted gross earnings for prior years, and proceeded to final judgment on the theory that such taxes could be recovered, though it is true that the point made by defendant in this case was not raised in either of the cases cited. We hold that the State may recover taxes on earnings for prior years not reported by the company.

Our conclusion on the whole case is in accord with that reached by the trial court, except as to nine per cent of the taxes under the first item. We hold that nine per cent of the taxes assessed on earnings on this class of business should be deducted from the judgment.

Remanded with directions to modify the judgment in accordance with this opinion.

BUNN, *J.*

87 16977.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 2.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

On motion of the Attorney General, it is ordered that the order heretofore made remanding this case be and it is hereby modified as follows:

Ordered that the judgment appealed from be and it is hereby modified by deducting from the amount thereof nine per cent of the

first item referred to in the opinion amounting to $269.22, and that the Clerk of this Court enter final judgment in favor of the respondent and against the appellant in this Court for the sum of $9450.44 with interest, and for the respondent's costs in both courts.

Dated June 1, 1911.

START, *C. J.*

(Endorsed:) Filed June 1, 1911. I. A. Caswell, Clerk.

88 State of Minnesota. Supreme Court. Copy of Minutes of Argument. Filed June 1, A. D. 1911. I. A. Caswell, Clerk.

89 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1911.

Tuesday morning, 9:30 o'clock, April 26, A. D. 1911 Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 16977.

Cal. No. 2.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

90 State of Minnesota. Supreme Court. Copy of order for judgment. Filed June 1, A. D. 1911. I. A. Caswell, Clerk.

91 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 2.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1911 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things modified by deducting from the amount thereof nine per cent of the first item referred to in the opinion, amounting to $259.22, and that the Clerk of this Court enter final judgment in favor of the respondent and against the appellant in this Court for the sum of $9450.44 with interest, and for the respondent's costs in both courts and that judgment be entered accordingly.

Entered June 1, A. D. 1911.

BY THE COURT.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

92 (Endorsed:) State of Minnesota. Supreme Court. Transcript of Judgment. Filed June 1, A. D. 1911. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol in the City of St. Paul this 1st day of June, A. D. 1911.

[SEAL.] I. A. CASWELL, *Clerk.*

93 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 2.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 1st day of June A. D. 1911,

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things modified by deducting from the amount thereof nine per cent of the first item referred to in the opinion, amounting to ($269.22) Two Hundred Sixty-nine and 22/100 Dollars. And it is further determined and adjudged that the Respondent above named, do have and recover of said United States Express Company, Appellant herein the sum and amount of Nine Thousand Eight Hundred Fifty-four and 20/100 Dollars ($9854.20) said sum including costs and disbursements in this cause in this Court, and that said Respondent have execution for the enforcement thereof.

Dated and signed this 1st day of June A. D. 1911.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

Statement for Judgment.

Entered by order of Court	$9,450.44
Interest on same	362.26
Costs as stipulated by parties	41.50
	$9,854.20

94 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the State of Minnesota, Plaintiff, vs. The United States Express Company, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 19th day of June, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minn.

95 In the Supreme Court of the State of Minnesota.

UNITED STATES EXPRESS COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error in the above entitled cause, and avers and shows that in the records and proceedings in said cause the Supreme Court of the State of Minnesota erred, to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

1st. The said Supreme Court erred in holding that the earnings of the plaintiff in error derived from express business transacted between points in Minnesota, where, however, the transportation involved passage through another state en route, are subject to taxation by said State of Minnesota; and in holding that the taxation of said earnings by said state did not constitute an unlawful interference with and burden upon interstate commerce and was not in violation and contravention of Section 8 of Article I of the Constitution of the United States relating to the regulation of commerce among the several states, nor in violation and contravention of the provisions of the Fourteenth Amendment to the Constitution
96 of the United States relating to the deprivation of property without due process of law.

2nd. The said Supreme Court erred in holding that the earnings of the plaintiff in error derived from express business transacted between points located on its lines in Minnesota, the originating or terminating point, however, of the shipments being located outside of the State of Minnesota, on the line or lines of another express company, to or from which said business is transferred, are taxable by said State of Minnesota; and in holding that the taxation of said earnings by said State of Minnesota did not constitute an unlawful interference with and burden upon interstate commerce and was not in violation and contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation of property without due process of law.

3rd. The said Supreme Court erred in holding that the earnings of the plaintiff in error derived from the sale of money orders in Minnesota are taxable by the State of Minnesota; and in holding that the taxation of such earnings by said State of Minnesota did

not constitute an unlawful interference with and a burden upon interstate commerce and a denial to the plaintiff in error of the equal protection of the laws and was not in violation and contravention of the provisions of Section 8 of Article I of the Constitution of the United States, relating to the regulation of interstate commerce, and also of the provisions of the Fourteenth Amendment of the Constitution of the United States, relating to the deprivation of property without due process of law and securing to all persons the equal protection of the laws.

97 4th. The said Supreme Court erred in holding that the provisions of Sections 1012 to 1021 inclusive of the Revised Laws of Minnesota for 1905, in so far as the same are construed to apply to and require the taxation of any or all of the items of earnings of the plaintiff in error hereinabove referred to are not in violation and in contravention of Section 8 of Article I of the Constitution of the United States, relating to the regulation of interstate commerce nor in violation and in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, relating to the deprivation of property without due process of law and the denial of the equal protection of the laws.

5th. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to the plaintiff in error its rights under the Constitution of the United States as claimed and set forth in the record in said cause.

6th. The said Supreme Court erred in holding that the taxation by the State of Minnesota of earnings of the plaintiff in error derived from express business of the character described in the first, second and third paragraphs hereof did not involve the taxation of property of the plaintiff in error situated beyond the limits of the State of Minnesota, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation of property without due process of law.

7th. The said Supreme Court erred in holding that the tax sought to be imposed upon the plaintiff in error in this proceeding as to each and every of the items above mentioned is not a tax upon the earnings of the plaintiff in error, or upon its right to engage in business within the State of Minnesota, but is a tax upon the prop-

98 erty of the plaintiff in error within the State of Minnesota, and is not a regulation of or interference with interstate commerce.

Wherefore, said United States Express Company hereby prays that said judgment may be reversed, annulled, and held for naught, and that it may be restored to all things which it has lost by occasion of said judgment.

UNITED STATES EXPRESS COMPANY,
By DAVIS, KELLOGG & SEVERANCE,
Its Attorneys.

99 [Endorsed:] 16977. Original. Supreme Court of the State of Minnesota. United States Express Co., Plaintiff in Error, vs. The State of Minnesota, Defendant in Error. Assign-

ments of Error. Filed Jun- 1, 1911. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, St. Paul, Minn.

100 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Petition for Writ of Error.

The petition of United States Express Company, the appellant in the above entitled cause, respectfully shows unto Your Honor:

1st. The said cause is an action commenced by the respondent above named against your petitioner to recover taxes based upon various items of gross earnings alleged to have been unreported for taxation during the years 1899 to 1908 inclusive. The total amount for which said respondent demanded judgment against your petitioner was the sum of Nine Thousand Seven Hundred Nineteen Dollars and Sixty-six Cents ($9719.66). Said cause of action is based upon and maintained under the law relating to the taxation of express companies embraced in sections 1012 to 1021 inclusive of the Revised Laws of Minnesota for 1905.

2nd. The items of gross earnings upon which the said respondent claims the right under said law to levy and collect taxes fall within the following classes:

a. Earnings derived from express business handled by your petitioner during the years 1899 to 1908 inclusive, between points in Minnesota, where, however, the transportation involved passage through another state en route.

101 *b.* Earnings derived from express business handled by your petitioner during the years 1899 to 1905 inclusive, between points located upon its lines in Minnesota, the originating or terminating point of such shipment being, however, located outside the state of Minnesota, upon the line or lines of another express company, to or from which said business was transferred.

c. Earnings derived by your petitioner during the years 1899 to 1908 inclusive from the sale of money orders, most of which were actually redeemed outside the state of Minnesota.

d. Miscellaneous earnings of your petitioner from business transacted during the year 1899.

Your petitioner, in and by its answer filed in said cause, contended that the said items of gross earnings do not represent earnings taxable under the law; that the said items designated above "*a*" and "*b*" represented earnings arising wholly from the transaction of interstate commerce; and that the taxation of such earnings by the respondent involves an unlawful burden upon and interference with

interstate commerce, as well as a deprivation of property of your petitioner without due process of law—all contrary to the provisions of the Constitution of the United States. With respect to the item of earnings designated "c" your petitioner, in and by its said answer, contended not only that such earnings did not arise from transportation within the meaning of said law, but also that said earnings were not taxable, for the reason that they arose from the transaction of interstate commerce, and that any attempt to tax them would be an unlawful burden upon and interference with interstate commerce, as well as a deprivation of property without due process of law—all contrary to the provisions of the Constitution of the United States.

102 3rd. The said cause was commenced in the District Court of Ramsey County, Minnesota, and, after answer by your petitioner and reply by the respondent, all of the facts involved in said cause were duly embodied in a stipulation of the parties, and upon a trial of the issues, the said District Court of Ramsey County, Minnesota, decided and gave judgment against the aforesaid claims of your petitioner, whereupon your petitioner took an appeal to the Supreme Court of the State of Minnesota, and, in said Court upon said appeal, your petitioner renewed its said claims as to the unconstitutionality and invalidity of said claim for taxes by the respondent, and each of the same, as hereinabove set forth. The said Supreme Court of the State of Minnesota, upon the hearing of said appeal, affirmed the order and judgment of said District Court of Ramsey County, save and except that the tax assessed upon the earnings hereinabove designated under the item "a" was reduced by the amount of nine (9) per cent thereof, by apportioning said earnings on the basis of mileage and deducting therefrom such proportion as was represented by mileage lying without the State of Minnesota.

4th. On the 1st day of June, 1911, final judgment, in accordance with the said order of the Supreme Court of the State of Minnesota, was duly entered and rendered by said Supreme Court of the State of Minnesota for the sum of nine thousand four hundred and fifty and 44/100 Dollars ($9450.44), with interest thereon from the 13th day of October, 1910, and also the sum of forty-one and 50/100 Dollars ($41.50) costs in both courts. The said Supreme Court of the State of Minnesota was and is the tribunal having jurisdiction under the laws of the State of Minnesota to render final judgment

103 in all proceedings and actions of the nature of the above entitled cause, and the said judgment is the final judgment in said cause in favor of the State of Minnesota and against your petitioner.

The said final judgment of the Supreme Court of the State of Minnesota was against each and all of the rights so claimed by your petitioner in said cause, all of which will more fully appear by the record in said proceedings now remaining in said Supreme Court.

Wherefore, for as much as your petitioner believes that there was manifest error in said decision of said court against the several claims of your petitioner as hereinbefore set forth and in the final judgment

in said action or proceeding, which is to the great damage of your petitioner, your petitioner prays that Your Honor will examine the records of said Supreme Court of the State of Minnesota in this behalf and allow your petitioner a writ of error to the end that said judgment and record may be brought before the Supreme Court of the United States agreeably to the laws of the United States in that behalf enacted.

Dated this 1st day of June, A. D. 1911.

UNITED STATES EXPRESS COMPANY,
By DAVIS, KELLOGG & SEVERANCE,
Its Attorneys.

104 [Endorsed:] 16977. Original. Supreme Court, State of Minnesota. State of Minnesota, Respondent, vs. United States Express Co., Appellant. Petition for Writ of Error. Filed Jun- 1, 1911. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Appellant, Merchants National Bank Building, St. Paul, Minn.

105 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA, Respondent,
vs.
UNITED STATES EXPRESS COMPANY, Appellant.

Order Allowing Writ of Error.

On reading and considering the petition of United States Express Company, appellant in the above entitled cause, praying that a writ of error be allowed returnable into the Supreme Court of the United States, to review the judgment of the Supreme Court of the State of Minnesota in the above entitled cause, entered on the 1st day of June, 1911, and upon the filing of an Assignment of Errors,—

It is Ordered That a Writ of Error be and hereby is allowed as prayed for, and that the amount of the bond on said Writ of Error be and hereby is fixed at ten thousand Dollars ($10,000.00), which bond shall operate as a supersedeas.

Dated this 1st day of June, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

106 [Endorsed:] 16977. Original. Supreme Court, State of Minnesota. State of Minnesota, Respondent, vs. United States Express Co., Appellant. Order Allowing Writ of Error. Filed Jun- 1, 1911. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Appellant, Merchants National Bank Building, St. Paul, Minn.

107 In the Supreme Court of the State of Minnesota.

UNITED STATES EXPRESS COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Bond.

Know all men by these presents, That we, United States Express Company, a joint stock association organized and existing under and by virtue of the laws of the State of New York, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the State of Minnesota in the sum of Twelve Thousand and no/100 Dollars ($12,000.00), to be paid to the State of Minnesota, for which payment well and truly to be made, we bind ourselves and each of us and each of our successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of June, in the year of our Lord, One Thousand, Nine Hundred and Eleven.

Whereas, The above named United States Express Company, Plaintiff in Error, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Minnesota,

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged
108 if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed) UNITED STATES EXPRESS COMPANY,
By DAVIS, KELLOGG & SEVERANCE,
Its Attorneys.

[Seal of Corporation.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By WM. M. CARSON, *Attorney in Fact.*

Attest:

CLARENCE A. STORMS, *Agent.*

Signed, sealed and delivered in presence of

C. W. G. WITHEE,
FRED DRESCH,
As to United States Express Co.
D. A. LINDECKE,
A. C. ANDERSON,
As to Fidelity & Deposit Company of Maryland.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this first day of June, A. D. 1911, personally appeared before me Wm. M. Carson, who, being duly sworn, deposes and says, that he is the attorney in fact for Minnesota of the Fidelity and Deposit Company of Maryland, that the seal affixed to the foregoing instrument is the Corporate Seal of said Corporation and that said instrument was signed and sealed on behalf of said Corporation by authority of its Board of Directors, and the said Wm. M. Carson acknowledged said instrument to be the free act and deed of said Corporation.

(Signed) FRED W. BARTON,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

My commission expires 5-31-1912.

109 [Endorsed:] Supreme Court of the State of Minnesota. United States Express Company, Plaintiff in Error, vs. The State of Minnesota, Defendant in Error. Bond.

(Endorsed.)

I hereby approve the within bond and the sureties therein named. Dated June 6, 1911.

(Signed) CHAS. M. START,
Chief Justice.

Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, St. Paul, Minn.

(Endorsed:) Filed June 6, 1911. I. A. Caswell Clerk.

110 In the Supreme Court of the United States.

UNITED STATES EXPRESS COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between United States Express Company, a joint stock association, appellant and plaintiff in error, and the State of Minnesota, respondent and defendant in error, wherein was

drawn into question the validity of a statute of and an authority exercised under said State of Minnesota, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege and exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great dam-

111 age of the said United States Express Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice —to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 1st day of July next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 1st day of June, A. D. 1911.

[U. S. Circuit Court Seal, Dist. of Minnesota, Third Division.]

LOUISE B. TROTT,
Clerk of the United States Circuit Court
for the District of Minnesota.

Allowed by
CHAS. M. START,
Chief Justice of the Supreme Court of
the State of Minnesota.

Service of the within writ of error is hereby admitted this first day of June, 1911.

GEORGE T. SIMPSON,
Attorney General,
By WILLIAM J. STEVENSON, *Assistant,*
Attorneys for Def't in Error.

112 [Endorsed:] 16977. Original. Supreme Court of the United States. United States Express Co. Plaintiff in Error, vs. The State of Minnesota, Defendant in Error. Writ of Error. Filed Jun- 1, 1911. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, St. Paul, Minn.

113 SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 1, 1911, in the matter of the State of Minnesota vs. The United States Express Company,

1. The original bond of which a copy is herein set forth.
2. One copy of the writ of error, as herein set forth, to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 19th day of June, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk of Supreme Court, Minnesota.

114 In the Supreme Court of the United States.

UNITED STATES EXPRESS COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Citation.

The United States of America to the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein the United States Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 1st day of June, A. D. 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Service of the foregoing citation is hereby admitted this first day of June, 1911.

GEORGE T. SIMPSON,
Attorney General,
By WILLIAM J. STEVENSON, *Assistant,*
Attorneys for Defendant in Error.

115 [Endorsed:] 16977. Original. Supreme Court of the United States. United States Express Co. Plaintiff in Error vs. The State of Minnesota, Defendant in Error. Citation. Filed Jun- 1, 1911. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, St. Paul, Minn.

116 STATE OF MINNESOTA,
Supreme Court, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the City of St. Paul, this 19th day of June, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minnesota.

Endorsed on cover: File No. 22,784. Minnesota Supreme Court. Term No. 708. United States Express Company, plaintiff in error, vs. The State of Minnesota. Filed June 29, 1911. File No. 22,784.

Office Supreme Court, U. S.
FILED.
SEP 27 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error.

vs.

STATE OF MINNESOTA,
Defendant in Error.

MOTION TO ADVANCE.

GEORGE T. SIMPSON,
Attorney General.
State of Minnesota.

WILLIAM J. STEVENSON,
Assistant Attorney General.
Solicitors for the State of Minnesota.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

MOTION TO ADVANCE.

Now comes the State of Minnesota by George T. Simpson, Attorney General thereof, and moves the court to advance the hearing in the above entitled action upon the docket, and set the same for argument on the 15th day of January, 1912, or at such other time as shall be designated by the court.

This motion is made under and by virtue of Section 7 of Rule 26 of the rules of this court.

GEORGE T. SIMPSON,
Attorney General.

WILLIAM J. STEVENSON,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

STATEMENT.

The State of Minnesota heretofore brought an action in the District Court of Ramsey County, Minnesota, against the United States Express Company, under the provisions of Sections 1012-1021 Revised Laws of Minnesota for the year 1905, to enforce taxes for the years 1899 to 1909 inclusive. The State claimed that the plaintiff in error failed to furnish a true and just return of certain of its earnings, including earnings on express business handled between points in Minnesota and passing through another state enroute; earnings on express business handled between points in Minnesota located on the lines of the plaintiff in error, but where the originating point or terminating point, or both, was a town located outside of the State of Minnesota on the lines of another express company; earnings on money order business,—a total

of $179,808.68,—on which under the claim of the state there were back taxes due in the aggregate amount of $9,719.66. Judgment was rendered in the District Court on October 13, 1910, in favor of the State of Minnesota against the United States Express Company for the sum of $9,719.66. Upon appeal to the Supreme Court such judgment was affirmed, except that the sum of $269.22 was ordered deducted therefrom, and final judgment on June 1, 1911, was entered in the Supreme Court of the State of Minnesota in favor of the State of Minnesota and against the plaintiff in error, for the sum of $9,450.54.

State v. United States Express Co., 131 N. W. 489. (Minn.)

Thereupon a writ of error was sued out and appeal perfected to this Court. The plaintiff in error claims that the laws of the State of Minnesota under which it is taxed, and the judgment of the Supreme Court of Minnesota, impose an unlawful burden upon and interference with, Interstate Commerce, in violation of the provisions of section 8 of article 1 of the Constitution of the United States; and deprive the plaintiff in error of its property without due process of law, deny to it the equal protection of the laws, and involve the taxation of property of the plaintiff in error situated beyond the limits of the State of Minnesota, in violation of the provisions of the 14th amendment to the Constitution of the United States. This claim is denied by the State of Minnesota.

The above entitled action affects only the plaintiff in error and the State of Minnesota, but the attention of the Court is further respectfully called to the fact that there are operating in the State of Minnesota at the present time, nine express companies similarly situated, and that for the time during which the plaintiff in error has been subjected to taxation in this action, such other express companies have been likewise engaged, and are likewise subject to a similar tax. That the amount involved for that reason in this litigation is not the sum of $9,450.44, but is, in all probability, in excess of $100,000.00, and that the present action is in the nature of a test suit, said other companies having withheld payment under like circumstances.

POINTS IN SUPPORT OF THE FOREGOING MOTION.

As bringing this motion within section 7 of rule 26 of the rules of this Court, it is respectfully submitted that the following special and peculiar circumstances exist under and by virtue of which the motion is well made and should be granted.

I.

The public revenues of the State of Minnesota are affected in this, that the sum of $9,450.44 and interest thereon, is withheld from the treasury of said State.

II.

Like sums will accrue to the State of Minnesota from each of the other express companies doing

business in said State in the aggregate exceeding $100,000.

III.

The withholding of said sums from the public revenue does embarrass the administration of the government of said State in this, that in the aggregate covering the years 1899 to 1909 inclusive, the gross sum, to-wit, of over $100,000 will be withheld from the public revenues.

The validity of said sums as taxes due the State of Minnesota depends upon the decision of this court in the cause now proposed to be advanced.

IV.

The importance of the advancement of this cause upon the docket to the United States Express Company, becomes likewise self evident, so much so that said Company joins in a request that said cause be advanced.

For the reasons stated, it is submitted that the cause should be advanced under the rule.

Respectfully,

GEORGE T. SIMPSON,

Attorney General, State of Minnesota.

WILLIAM J. STEVENSON,

Assistant Attorney General, State of Minnesota.

Dated September 12, 1911.

STATE OF MINNESOTA,
County of Ramsey. ss.

George T. Simpson being first duly sworn, deposes and says that he is the Attorney General of the State of Minnesota; that he has read the foregoing statement and points in support of the foregoing motion, and that the same are true of his own knowledge, except those matters stated on information and belief, and as to these he believes them to be true.

GEORGE T. SIMPSON,

Subscribed and sworn to before me this 12th day of September, 1911.

AUGUSTA STEINHARDT,
Notary Public, Ramsey County, Minnesota.
(Seal)

My commission expires June 30, 1918.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error.

vs.

STATE OF MINNESOTA,
Defendant in Error,

NOTICE.

To the United States Express Company, Plaintiff in Error, Frank B. Kellogg, C. A. Severance and Robert E. Olds, their attorneys and solicitors:

Please take notice that on the 10th day of October, 1911, at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon. Annexed hereto is a copy of the brief of argument and points in support of the motion.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
WILLIAM J. STEVENSON,
Assistant Attorney General of Minnesota.
Dated St. Paul, Minnesota, September 18, 1911.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error.

vs.

STATE OF MINNESOTA,
Defendant in Error.

JOINDER IN MOTION.

Now comes the United States Express Company, Plaintiff in Error, by Frank B. Kellogg, C. A. Severance, and Robert E. Olds, their attorneys and solicitors, and joins in the motion of the State of Minnesota, Defendant in Error, to advance the said cause upon the docket, and prays that said motion may be granted and that said motion may be heard in its order on the 10th day of October, 1911.

Receipt of a copy of the brief of argument and points to be submitted with said motion and in support thereof, is hereby acknowledged.

FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
Attorneys and Solicitors for the United States Express Company.

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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 708.

Office Supreme Court, U
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UNITED STATES EXPRESS COMPANY,
Plaintiff in Error.

vs.

STATE OF MINNESOTA,
Defendant in Error.

RENEWAL OF MOTION TO ADVANCE.

GEORGE T. SIMPSON,
Attorney General, State of Minnesota,
WILLIAM J. STEVENSON,
Assistant Attorney General of Minnesota,

FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
Attorneys and Solicitors for the United States Express Company.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error.

vs.

STATE OF MINNESOTA,
Defendant in Error.

RENEWAL OF MOTION TO ADVANCE.

At the opening of the October term of this court, the undersigned, the Attorney General of Minnesota, made a motion to advance this case, and filed therewith a statement and brief. At the said time there was also a motion made in the case of Leo Meyer, Auditor of the State of Oklahoma, vs. Wells, Fargo & Company, No. 624. Both motions were denied. Since the same were denied, the Attorney General for the State of Oklahoma and the attorneys for Wells, Fargo & Company have renewed the said motion, stating additional grounds therefor. As the question involved in this case is similar to that in-

volved in No. 624, we respectfully submit that if the court advances No. 624, No. 708 should be also advanced and set down for argument at the same time. The reasons for advancing the cause are fully set fourth in the original statement herein.

GEORGE T. SIMPSON,
Attorney General, State of Minnesota,
WILLIAM J. STEVENSON,
Assistant Attorney General of Minnesota,
FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
Attorneys and Solicitors for the United States Express Company.

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Supreme Court of the United States

October Term, 1911.

No. 708.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR.

FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

October Term, 1911.

No. 708.

UNITED STATES EXPRESS COMPANY,

Plaintiff in Error,

vs.

STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

I.

STATEMENT OF THE CASE.

This action was brought by the State of Minnesota in its own courts against the plaintiff in error, hereinafter referred to as the Company, to recover taxes upon certain items of gross earnings which the Company contends are not taxable by the State and therefore did not report for taxation during the years 1899 to 1908 inclusive. All of the facts in the case were embodied in a stipulation which appears on page 12 of the Transcript of Record.

The Company is an unincorporated association of individuals ~~organized pursuant to the laws of~~ with its principal office in the State of New York and engaged in what is generally known as the express business. It does not own directly or indirectly any means or

instrumentalities of transportation except the wagons used by it for collecting the goods of shippers at their residences or places of business and for delivering goods to consignees at points of destination. The business is carried on by the Company under contracts made with railroads, which contracts provide for the transportation by the railroad companies, under the personal care of employees of the express company, upon passenger trains (or in some instances upon special trains made up exclusively of cars for express matter) of goods forwarded by the express company, and for the payment by the express company to the railroad company, as compensation for such service, of a certain percentage of the gross receipts of the express company derived from the business transported over the respective lines of railroad. Under such contracts the Company has for many years been engaged in carrying on express business upon many lines of railroad throughout the United States, amounting in the aggregate to some 30,000 miles of road; and has been engaged in carrying on the express business upon the following lines of railroad in the State of Minnesota: Chicago, Rock Island & Pacific Railway, Duluth & Iron Range Railroad, and (until April 30, 1909, but not thereafter) Chicago, Milwaukee & St. Paul Railway. The Company maintains offices in twenty-eight states, in the District of Columbia, in Canada, and in various European countries. At the present time the Company has about fifty offices in the State of Minnesota, and forwards its express matter over the lines of the Chicago, Rock Island & Pacific Railway and the Duluth & Iron Range Railroad, which two companies have in the state a combined mileage of about 424 miles. Prior to April 30, 1909, the Company also forwarded its express matter over the lines of the Chicago, Milwaukee & St. Paul Railway, whose mileage in the State

of Minnesota was about 1238 miles, and prior to said date last mentioned the Company had over 200 offices in the State of Minnesota.

The items of earnings, the taxability of which by the State is challenged in this court, are as follows:

1st. Earnings upon so-called "Interstate Transfer Business"; that is to say, earnings derived by the Company from the following classes of express shipments:

a. Shipments received by an express company from a shipper at a point of origin outside the State of Minnesota, addresed to and destined to a consignee within the State of Minnesota; or

b. Shipments delivered to an express company by a shipper in the State of Minnesota and addressed to and destined to a consignee without the State of Minnesota; or

c. Shipments delivered to an express company by a shipper without the State of Minnesota and addressed to and destined to a consignee without the State of Minnesota, but passing through the State of Minnesota in transit.

As to all of said shipments, whether in class a, class b, or class c, the Company received them at a point in the State of Minnesota and forwarded them over its lines to another point within the State of Minnesota, the transportation while in the hands of the Company being performed wholly within the state. The transportation in connection with such shipments outside the State of Minnesota was performed by connecting express companies. Each of said shipments was made upon a through rate and a through waybill and bill of lading showing the origin and ultimate destination thereof, and (as the stipulation re-

cites) "consisted of a single transportation transaction commencing with the delivery by the shipper to an express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed." It further appears that the State has not attempted to tax earnings from such interstate shipments where the service both within and without the State of Minnesota is performed by a single company.

2nd. Earnings derived from "Intermediate Business," so-called. This item was made up of earnings from shipments delivered to the Company in the State of Minnesota and consigned to a consignee located at another point in the State of Minnesota, which shipments were forwarded by express between the point of origin and point of destination over lines of railroad running partly within and partly without the State of Minnesota. All of these shipments, therefore, necessarily passed out of the state in transit. The stipulation recites that 91% of the mileage involved on shipments under this item was within the State of Minnesota. While the Minnesota law makes no provision for apportioning these earnings on a mileage basis, the Supreme Court of the State did, however, make an apportionment by subtracting from the total earnings under said item 9% thereof and computing the tax upon the remainder.

With the modification above mentioned concerning the item of "intermediate business" the Supreme Court of Minnesota has held these items taxable under the statute, which appears as an appendix to this brief. It is sufficient at this point to state that the statute in question appears as a separate subdivision of the Revised Laws of Minnesota for 1905, relating to the taxation of express companies. It

was originally enacted pursuant to a constitutional amendment authorizing the imposition of a gross earnings tax upon express companies, sleeping car companies, etc. By the terms of the statute, the State Auditor is directed, after procuring the necessary information, to assess upon each express company "a tax of six per cent upon its gross receipts for business done between points within this state for the preceding calendar year, as determined by the Auditor, which shall be in lieu of all taxes upon its property." The question presented for the decision of this court is whether, under such statute, the earnings from interstate express shipments above described may be taxed by the State.

The opinion of the Supreme Court of Minnesota will be found on page 39 of the Transcript of Record.

II.

ASSIGNMENTS OF ERROR.

1st. The said Supreme Court erred in holding that the earnings of the plaintiff in error derived from express business transacted between points in Minnesota, where, however, the transportation involved passage through another state en route, are subject to taxation by said State of Minnesota; and in holding that the taxation of said earnings by said state did not constitute an unlawful interference with and burden upon interstate commerce and was not in violation and contravention of Section 8 of Article 1 of the Constitution of the United States relating to the regulation of commerce among the several states, nor in violation and contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation of property without due process of law.

2nd. The said Supreme Court erred in holding that the earnings of the plaintiff in error derived from express business transacted between points located on its lines in Minnesota, the originating or terminating point, however, of the shipments being located outside of the State of Minnesota, on the line or lines of another express company, to or from which said business is transferred, are taxable by said State of Minnesota; and in holding that the taxation of said earnings by said State of Minnesota did not constitute an unlawful interference with and burden upon interstate commerce and was not in violation and contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation of property wthout due process of law.

3rd. The said Supreme Court erred in holding that the provisions of Sections 1012 to 1021 inclusive of the Re-

vised Laws of Minnesota for 1905, in so far as the same are construed to apply to and require the taxation of any or all of the items of earnings of the plaintiff in error hereinabove referred to are not in violation and in contravention of Section 8 of Article 1 of the Constitution of the United States, relating to the regulation of interstate commerce nor in violation and in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, relating to the deprivation of property without due process of law and the denial of the equal protection of the laws.

4th. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to the plaintiff in error its rights under the Constitution of the United States as claimed and set forth in the record in said cause.

5th. The said Supreme Court erred in holding that the taxation by the State of Minnesota of earnings of the plaintiff in error derived from express business of the character described in the first and second paragraphs hereof did not involve the taxation of property of the plaintiff in error situated beyond the limits of the State of Minnesota, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation of property without due process of law.

6th. The said Supreme Court erred in holding that the tax sought to be imposed upon the plaintiff in error in this proceeding, as to each and every of the items above mentioned, is not a tax upon the earnings of the plaintiff in error, or upon its rights to engage in business within the State of Minnesota, but is a tax upon the property of the plaintiff in error within the State of Minnesota, and is not a regulation of or interference with interstate commerce.

III.

BRIEF OF ARGUMENT.

A. *The Minnesota statute, as construed by the courts of that state, imposes a tax upon gross receipts arising from interstate commerce.*

With the construction of the local statute we are not here concerned. The Supreme Court of Minnesota has set all questions of that nature at rest, and its decision we understand to be in that respect conclusive. It is worth noting, however, that, in construing the law as applicable to the items of earnings involved in this case, the Minnesota court was not impelled to that conclusion by any direct language found in the law itself, but based its opinion largely upon the circumstance that such construction brought the law more in harmony with a general scheme of gross earnings taxation which has prevailed in the state for many years. That the construction given the statute is not only unnecessary, but would be regarded by this court as erroneous, were the matter here for determination, is apparent from the decision in *Pacific Express Co. v. Seibert*, 142 U. S. 339, where a Missouri law almost identical in terms with the Minnesota law was differently construed, in order to save it, as against the objection that it would otherwise be void as imposing a burden upon interstate commerce. In the Seibert case this court was unfettered by any construction of the Missouri law by the courts of that state.

Accepting, therefore, the construction already placed upon the statute, it becomes important to determine its precise effect. In the statement of the case we have alluded to the fact that no attempt has been made thus far by the local authorities to tax receipts derived from interstate transportation, where the carriage both within and without the

state is performed by the same express company—save in the single instance of so-called intermediate business, where the transportation is between points both located within the state but passing through another state in transit. The Minnesota court in this case has held that gross receipts derived by the express company from interstate shipments may, under this law, be taxed, provided the receipts are, so far as the company taxed is concerned, derived from actual transportation carried on wholly within the state. The court has further, although the statute makes no provision for it, apportioned the tax on a mileage basis as to receipts from shipments between points within the state, but passing beyond the borders of the state in transit. The total effect is this: By administrative and by judicial construction, the local statute is now applied and limited to that proportion of interstate earnings represented by transportation within the state of Minnesota. In other words, the stipulated fact with regard to the so-called interstate transfer business, that each shipment was made "upon a through rate and a through waybill and bill of lading showing the origin and ultimate destination thereof, and consisted of a single transportation transaction commencing with the delivery by the shipper to an express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed" is held to be immaterial; and the State claims the right to tax the plaintiff in error upon its earnings derived from such shipments because the service which it performed was confined to the borders of the state, and the balance of the service in connection with the shipment was performed by some connecting carrier.

That the earnings from interstate transfer business constitute receipts derived from interstate commerce is a proposition fully established by the decisions of this court. The circumstance that the plaintiff in error operated a line wholly within the state is immaterial, so long as the function which it performed was a part of a continuous journey from one state to another, under a single, continuous contract of carriage. Whether carried on by one, or by two or more express companies, the commerce involved is itself interstate, and no part of it can be divested of its interstate character by the accidental circumstance that it may be carried on by one of the companies wholly within state lines.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196;
Fargo v. Michigan, 121 U. S. 230;
Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 343, 344;
Norfolk & Western R'd Co. v. Pennsylvania, 136 U. S. 114, 119;
State of New York ex rel v. Knight, 192 U. S. 21;
Galveston, Harrisburg & San Antonio R'y Co. v Texas, 210 U. S. 217;
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;
People v. Miller, 178 N. Y. 194.

We do not deem it necessary to quote from the foregoing decisions. The point was of course directly involved in the Galveston case, where the railroad whose earnings were taxed was wholly located within the state of Texas; and it was strikingly enforced in *Southern Pacific Terminal Co. v. Interstate Commerce Commission, supra*, where the same railroad was involved, and the shipments were not even made under a through bill of lading.

B. *The tax upon the receipts from "interstate transfer business" is invalid as an attempt by the State to impose a direct burden upon interstate commerce.*

The language of the statute should be kept in mind. By the section which provides for the levy and collection of the tax the State Auditor is required to "assess upon each company a tax of six per cent upon its gross receipts for business done between points within this state for the preceding calendar year, as determined by the Auditor, which shall be in lieu of all taxes upon its property." The tax is therefore levied directly against the gross receipts. There is no attempt whatever to disguise this tax by calling it an occupation tax, or a license tax, or a franchise tax, or by the use of the words "equal to"—as has usually been the case in state legislation designed to reach the earnings from interstate commerce. We shall later discuss the effect of the final clause above quoted. At this point we desire only to make it clear that the tax is directly and in terms upon the receipts.

Certain propositions may at this day be taken for granted. One of these is that interstate commerce is within the exclusive control of Congress. Another—a necessary corollary to the first—is that any state legislation which operates as a tax upon or otherwise directly burdens interstate commerce is void. Consequently, if this Minnesota law, as now construed, amounts to a direct tax upon interstate commerce, it must be held unconstitutional.

It would be a comparatively easy matter at this stage of the argument to be led into a lengthy discussion and elaborate analysis and classification of the decisions of this court on the subject of interstate commerce. It is not our purpose to do this. Nevertheless, the gravity of the issues before us, as well as the long and complicated con-

troversy over attempted regulations of interstate commerce by the states renders some brief reference to the history of this controversy absolutely necessary. It is naturally impossible to present a question of this character as a new problem for solution. Like all other similar questions, it is simply an old problem from a new aspect.

While the course of decision in this court has not at all times been entirely consistent with the theory that interstate commerce must be kept absolutely free from state regulation or interference, we believe it is a fair statement to say that the court has never intended to depart, even in the slightest degree, from that fundamental principle. Certain it is that whenever any decision of the court has been found in practice to open the door for state regulation, however slight, this court has not hesitated to overrule its former decisions and to enforce the principle in all its absolute finality. The examples of this action to which we shall refer are of the utmost significance.

One of the earliest cases on the power of a state to levy a tax upon interstate commerce is that of *State Freight Tax,* 15 Wallace 232, decided in 1872. A Pennsylvania law required railroad companies to make quarterly returns of the number of tons of freight carried and to pay upon each ton of freight so carried taxes at certain specified rates. The question presented was whether the statute could be sustained, so far as it imposed a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it. It was held that such a tax amounted to a regulation of commerce among the states and was therefore repugnant to the commerce clause of the Federal Constitution. The opinion, which was written by Justice Strong, said:

"The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce, and as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that interchange of commodities with other states would be rendered impossible."

At the same term the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, was decided. This is the first case involving a state tax upon gross receipts from interstate transportation. Here, also, a Pennsylvania statute was under consideration. It required every railroad company incorporated under the laws of the commonwealth to pay semi-annually a tax of ¾ of 1 per centum upon its gross receipts. The question was whether the tax was valid as applied to gross receipts derived in part from transportation of merchandise to and from other states. Justice Strong also wrote the opinion in this case, which upheld the tax. There were two grounds for the decision: First, that the semi-annual tax was not one upon the transportation itself, but was upon the gross receipts after they had become commingled with the general mass of the company's property and had become taxable as such; second, that the tax was sustainable as one upon the franchise, the value of which was measured by the gross receipts.

Following the decision in *State Tax on Railway Gross Receipts*, and perhaps as a logical consequence thereof, was a period of more than a decade during which the power of the states over interstate commerce, both with respect to taxation and with respect to the making of rates, received full recognition. The rate regulating power of the states was in 1874 conceded, rather than carefully reasoned out and decided, in *Railroad Co. v. Maryland*, 21 Wallace

456. Justice Bradley, writing the opinion of the court, said:

> "Had the State built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the State, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them."

Again it was said:

> "So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation and the amount of the charge, are absolutely within the control of the State, how can it matter what is done with the money, whether it goes to the State or to the stockholders of a private corporation? As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? * * * The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers."

Justice Miller dissented both in the Maryland case and in *State Tax on Railway Gross Receipts.* In the latter case he was joined in the dissent by Justices Field and Hunt.

In 1876 the court held in *Peik v. Chicago & Northwestern R'y Co.,* 94 U. S. 164, that a Wisconsin law prescribing maximum rates for transporting persons and property between points within and without the state was valid. The

rate-making power of the states was also recognized in other cases decided at the same time.

Munn v. Illinois, 94 U. S. 113;
Chicago, Burlington & Quincy R'y Co. v. Iowa, 94 U. S. 155;

Finally in *Wabash, St. Louis & Pacific R'y Co. v. Illinois*, 118 U. S. 557, the power of the states over interstate rates was definitively denied.

The Wabash case apparently marked the turning point. From that time forward the doctrine that interstate commerce must be kept free from state regulation and taxation began to take definite form.

The holding in *State Tax on Railway Gross Receipts* began to be questioned almost immediately, and it is significant that the very first case which now arose involving the taxability of gross receipts is decisive of the present controversy. In *Fargo v. Michigan*, 121 U. S. 230, decided in 1886, the situation was in all essential aspects the same as that now before the court. The Michigan statute there under consideration appears as No. 152 of the Public Acts of Michigan for the year 1883, and is entitled: "An Act to provide for the taxation of persons, copartnerships, associations, car loaning companies, corporations and fast freight lines engaged in the business of running cars over any of the railroads of this State, and not being exclusively the property of any railroad company paying taxes on their gross receipts." Section 1 provided:

> "That every person, copartnership, corporation, association, car loaning company or fast freight line engaged in the business of running cars over any of the railroads of this State, and not being exclusively the property of any railroad company paying taxes in this State, on their gross receipts, who are or may here-

after be engaged in the business of carrying passengers in any palace, drawing-room, sleeping, chair, or other car over or upon any railroad in this State, or any part thereof, for the right of occupancy of which passengers are required to pay a sum additional to that charged upon the ordinary cars of the road over which said palace, drawing-room, sleeping, chair, or other car, as aforesaid may be hauled, shall keep, in such manner as shall be prescribed by the commissioner of railroads, a just and true account of all sums so received by them as additional charges for the occupancy of such cars *over any road or portion thereof, within the limits of this State*, and shall, on or before the first day of April of each year, report to said commissioner of railroads, on blanks to be furnished by him for such purpose, *the gross amount of such receipts as aforesaid, earned within the limits of this State*, for the year ending on the thirty-first day of December next preceding the date of such report."

Section 2 required persons, corporations, etc., owning, running or interested in fast freight lines, etc., to keep accounts and make reports as provided in section 1 in the case of palace, drawing-room and other passenger cars. Section 3 provided for the verification of such reports. Section 4 required the commissioner of railroads to make and file a computation of the amount of tax, based upon the report so made, and provided penalties for failure to report. Section 5 read as follows:

"Every corporation, association, copartnership, car loaning company, or person as specified in sections one and two of this act shall, on or before the first day of July in each year, pay to the State treasurer, upon the statement of the auditor general, an annual tax of two and one-half per cent upon their gross receipts as computed by the commissioner of railroads, and derived from passengers or from the loaning, renting, or hiring these cars to any railroad or other corpora-

> tion, association, copartnership or party, *and such taxes shall be in lieu of all other taxes upon the cars used for the purposes mentioned in sections one and two of this act.*"

The remainder of the act dealt with the mode of collecting the tax thus imposed.

Fargo v. Michigan grew out of an attempt to apply the tax provided by this act to earnings of the Merchants Despatch Transportation Company, which was engaged in the business of soliciting and contracting for the transportation of freight, all of which went on through bills of lading in cars owned by the company. These cars "were not used for the carriage of freight between points situate within the said state of Michigan but wholly for the transportation of freight either passing through the state or originating at points without said state and destined to points within, or originating at points within said state and destined to points without." The several railroad companies making use of the cars of the Merchants Dispatch Transportation Company paid to the latter, as compensation therefor a definite sum per mile for the distance traveled by the said cars over their respective lines. It further appeared that the transportation company filed a report, duly verified under the law,

> "setting forth that the gross amount of the receipts of the said transportation company for the mileage of said cars during said year 1883, while in use in the transportation of freight between points without said state and passing through said state in transit, estimated and *pro-rated according to the mileage of said cars within said state of Michigan* while so in use, was the sum of $95,714.50; and while in the use of transportation of freight from points without to points within said state of Michigan, and from points within

> to points without said state, estimated and *pro-rated according to the mileage of said cars within the state of Michigan* while so in use, was the sum of $28,-890.01, making in the aggregate the sum of $124,-604.51; that during said year it received no moneys whatever on business done solely within the state of Michigan, and no moneys which were or could be regarded as earned during said year within the limits of said state of Michigan other than as hereinbefore and in said report set forth.

The taxing officials assessed a tax on the second of the items of earnings above mentioned. The suit was brought by the complainant, as president of the Merchants Dispatch Company, to enjoin the collection of the tax. The decree of the Supreme Court of Michigan, sustaining the demurrer to the bill was reversed by this court on writ of error. The court held that a tax upon the receipts here involved was one upon interstate commerce and therefore void under the constitution.

It is perfectly clear that the commerce which gave rise to the earnings reported by the Merchants Dispatch Transportation Company was interstate; that under the statute these earnings had been apportioned on a mileage basis, so that the report for taxation included only earnings from actual transportation within the borders of the state of Michigan; and that the company carried no freight whatever the transportation of which was between points exclusively within the state. After stating the facts, Justice Miller, in the opinion of the court, said:

> "It will thus be seen that the act imposed a tax upon all the gross receipts of the Merchants' Dispatch Transportation Company, a corporation under the laws of the state of New York, and with its principal place of business in that state, *on account of goods transported by it in the state of Michigan;* and the bill

states that the company carried no freight the transportation of which was between points exclusively within that state."

With the earlier decisions evidently in mind, the court said:

"With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by its Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state."

After stating the case of *State Tax on Railway Gross Receipts*, the court said:

"The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of transportation of persons or

merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

Thus the second of the two grounds of decision in *State Tax on Railway Gross Receipts* was discredited. The first ground was, for the time being, allowed to stand because it was not necessary to overrule it in the pending case.

If anything further were needed to make *Fargo v. Michigan* determinative of the issue here, it is found in the fact that the statute contained the same sort of "lieu" clause as appears in the Minnesota law. Every argument that is made by the State in this case was equally applicable from the point of view of the state of Michigan in *Fargo v. Michigan*. The ruling in the Michigan case represented the unanimous opinion of the court, and during a period of 25 years of earnest debate on the general subject, we cannot find that the correctness of the ruling has ever been questioned by this court. It stands to-day just as it did in 1886, as a clear and definitive holding that a state tax levied upon gross receipts, arising from interstate commerce, is void, even though the receipts are apportioned on a mileage basis so as to include only those derived from actual transportation within the borders of the taxing sovereignty, and even though the law under which the tax is assessed states on its face that the tax is "in lieu of all other taxes" upon the property.

The first ground of decision in *State Tax on Railway Gross Receipts* was expressly overruled in *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, decided in 1887. The Pennsylvania law there under consideration imposed a tax of 8-10ths of 1 per centum upon the gross receipts of every company carrying on a transportation,

telegraph or express business. The steamship company was a Pennsylvania corporation engaged in transporting persons and property by sea between different states and to and from foreign countries. The specific question presented was whether under this law the State might tax the gross receipts of the company "derived from freight and passage money between the ports of Philadelphia and Savannah, and in foreign trade from New Orleans, and a small amount for charter parties in the like trade." A decision by the Pennsylvania courts in favor of the State was reversed by this court on writ of error. The question was thus stated by Justice Bradley, who wrote the unanimous opinion of the court (p. 335):

> "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. * * * If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and

freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

Coming to *State Tax on Railway Gross Receipts*, the court said (p. 341):

"The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it."

After reviewing the decision in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, where a tax upon the capital stock of a ferry company operated between Pennsylvania and Delaware was held to be a tax upon the commerce carried on between the two states and therefore invalid, the court said (p. 344):

> "The decision in this case (*Gloucester Ferry Co. v. Pennsylvania*), and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise."

Philadelphia & Southern Steamship Co. v. Pennsylvania is an emphatic holding under a statute which, like the Minnesota law, levied a tax directly on the gross receipts, that such a tax constitutes a burden upon the commerce from which the receipts are derived and is invalid when laid by a state upon receipts from interstate commerce. The case has been recognized as stating the settled law on the subject for nearly a quarter of a century. The court recently took occasion to endorse it in the following language:

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

Galveston, Harrisburg &c. Ry. Co. v. Texas, 210 U. S. 224.

In the following year (1888) the court decided the case of *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, which involved a tax assessed under an Ohio statute upon the receipts of the telegraph company derived partly from interstate commerce and partly from commerce within the state. The receipts had been returned and assessed in gross without separation or apportionment. The agreed statement of facts, however, upon which the case was tried showed separately the earnings from interstate commerce and those from commerce carried on wholly within the state. The court held that the assessment was not wholly invalid, but that the earnings being separable, it was invalid as to the extent that such earnings were derived from interstate commerce. Justice Miller, again writing the unanimous opinion of the court, said (p. 424):

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid. * * * Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.* * *
>
> Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a

telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation and apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is

Affirmed."

In the same volume appears *Leloup v. Port of Mobile*, 127 U. S. 640 (1888), where it was held that a general license tax imposed upon telegraph companies as a condition of doing business was a tax upon the business itself and on that account unconstitutional as applied to a company engaged in transmitting messages between different states. The license affected the company's entire business, interstate as well as domestic. In the opinion by Justice Bradley, it was said (p. 648):

"In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

The case is also interesting for the following language overruling *Osborne v. Mobile*, 16 Wall. 479, decided in the

same year with *State Tax on Railway Gross Receipts*, thereby illustrating further the proposition that the court had definitely abandoned the general attitude assumed toward these questions in 1872 (p. 647):

> "The state court relies upon the case of *Osborne v. Mobile*, 16 Wall. 479, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company, doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of $500; if the business was confined within the limits of the State, the license fee was only $100; if confined within the city, it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states."

The Ratterman case was followed in *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S. 39, which came up from Pennsylvania in 1888 upon a similar state of facts.

In *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, decided in 1889, it appeared that an Alabama statute imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The company, in the first instance, made a report to the Board of Assessors covering only its gross receipts from business transacted wholly within the state. The Board then required and was furnished a further return covering gross receipts from messages carried partly within and partly without the state. The tax was

imposed upon the gross receipts as shown by both returns. It was held that the tax imposed upon the messages comprised in the second return was unconstitutional as a regulation of interstate commerce. The case was accordingly sent back by this court, so as to enable the two classes of receipts to be properly separated and the tax to be imposed upon the receipts from messages carried wholly within the state.

In *Lyng v. Michigan*, 135 U. S. 161, (1890) the court said (p. 166):

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Leloup v. Mobile*, 127 U. S. 640, 648, and cases cited."

In *Norfolk & Western R'd v. Pennsylvania*, 136 U. S. 114, 118 (1890), the court said:

> "It is well settled by numerous decisions of this court, that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

Crutcher v. Kentucky, 141 U. S. 47, (1891) called in question a Kentucky statute requiring express companies to take out a license as a condition for doing any business in the state. Under this law, companies having a capital of less than $150,000 were barred. It was held that, as applied to a corporation engaged in interstate commerce, the statute was void. The court said (p. 57):

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right to which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; * * *

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection."

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, (1892) to which we have already adverted, the court said (p. 349):

"It is well settled that a State cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on; for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress."

Thus far, in a line of decisions beginning with the Wabash case and extending over a period of several years, the court had been practically united in declaring without qualification that interstate commerce and the receipts arising

therefrom could not be regulated or taxed by the State. It was, of course, inevitable that from the maze of local statutes framed to fall within the rule and still secure to the state governments their share of taxes from corporations engaged in interstate commerce, a case should sooner or later arise to divide the court. This case was *Maine v. Grand Trunk R'y Co.*, 142 U. S. 217, submitted in 1891, and decided in December of that year. It involved a Maine statute which, at least in form, differed very materially from those which had theretofore come to the notice of the court. By section 1 of that statute the lands of every railway outside of its located right of way, and all of its buildings, were declared subject to taxation as other property is taxed, by the several cities and towns in which such buildings and lands were situated. By section 2 every corporation, person or association, operating a railroad in the state was required to pay an annual excise tax for the privilege of exercising its franchise in the state, which, with the tax provided for in section 1, shall be in lieu of all taxes upon such railroad, its property and stock. Section 3 fixed the amount of the tax as follows:

> "The amount of the gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth day of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on increasing the rate of the tax one-quarter of one per centum for

> each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, provided, the rate shall in no event exceed three and one-quarter per centum. When a railroad lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to the same proportion of the gross receipts in this State, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this State."

It will be observed that the tax purported to be an annual excise tax; that the amount was fixed by percentages varying up to a certain limit upon the average gross receipts per mile multiplied by the number of miles operated within the state when the road extended outside; that the tax was not levied directly upon the gross receipts; that the entire scheme of the statute seemed to justify the inference that the legislature was attempting in good faith to reach the value of the property per mile and not to tax the receipts as such. Notwithstanding these distinctions, Justices Bradley, Harlan, Lamar and Brown were of the opinion that the case was not distinguishable from *Philadelphia Steamship Co. v. Pennsylvania*. After reviewing the line of cases to which we have referred, they said in a dissenting opinion written by Justice Bradley:

> "We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so called, but what

is it in fact? It is a tax on the receipts of the company derived from international transportation."

The majority of the court, however, held that there was a distinction between the case before them and the previous cases, and, in an opinion by Justice Field, the tax was upheld. The court said:

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred. * * *
>
> The case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different States and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

Manifestly, the distinction which appealed to the majority of the court was that in the earlier case the tax was in terms upon the gross receipts, while in the later case it was not. Any intention of modifying to the slightest extent the doctrine of *Philadelphia Steamship Co. v. Pennsylvania* was emphatically disclaimed. We shall have occasion to consider this case again in connection with the Galveston case decided in 1908.

That *Maine v. Grand Trunk R'y Co.* was decided upon the peculiar facts there presented is shown by the fact that the court was not swerved by it from the path marked out by its previous decisions.

In *Postal Telegraph Co. v. Adams*, 155 U. S. 688 (1895), a Mississippi law imposing a privilege tax upon various corporations, such as express companies, telegraph companies, gas companies and upon brokers, auctioneers, etc., was sustained. The tax in the case of the telegraph company was fixed at $3,000 on each company operating within the state 1,000 miles or more of wire; and upon each company operating less than that amount of wire the tax was $1 per mile. The tax thus levied was "in lieu of other state, county and municipal taxes." It appeared that the tax levied under this law upon the company involved was less than would have been paid under the ordinary ad valorem property tax. The court held (Justices Brewer and Harlan dissenting) that the tax was valid. At the very beginning of the opinion Chief Justice Fuller said:

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of

> the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The court, it will be noticed, was careful to make the reservation that a tax laid on receipts derived from interstate commerce would be void.

Erie Railroad v. Pennsylvania, 158 U. S. 431, decided in 1895, offers an interesting distinction. The Pennsylvania statute there under consideration imposed a tax of 8-10ths of one per cent upon gross receipts for "tolls and transportation." A toll had been defined by the Pennsylvania courts as a "tribute or custom paid for passage, not for carriage—always something taken for a liberty or privilege, not for a service." The precise question was whether the statute thus construed could be applied to tolls paid by a company to another for the use of its railroad, where the company paying the tolls was engaged in the transportation of merchandise from points within the state to points beyond. The court upheld the tax upon the ground that it was not laid upon the transportation of subjects of interstate commerce or upon receipts derived therefrom. Its interference with interstate commerce was conjectural, remote and indirect. Speaking of the State's contention, the court said (p. 437):

> "In support of this contention numerous decisions of this court are cited, in which it has been held that state statutes which levy taxes upon gross receipts of railroads for the carriage of freights and passengers into, out of, or through the State put a burthen upon commerce among the States, and are therefore void.
>
> It is needless to review the cases cited, because we regard the proposition they are quoted to sustain as thoroughly established; but is the principle of those cases applicable to this? * * *

The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. * * *

It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

In *Louisville & Nashville R'd v. Kentucky*, 161 U. S. 677, (1896), where it was contended that the assumption of a right to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce, the court said (p. 701):

"The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden."

The latest announcement of this court on the subject of the taxability of gross receipts is found in *Galveston, Harrisburg & San Antonio R'd Co. v. Texas*, 210 U. S. 217, decided in May, 1908. Here again, as in *Maine v. Grand Trunk R'y Co.*, we find the court divided, both the majority and the minority, however, disclaiming any intention of departing from the rule established in *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania*. The facts were as follows:

Suit was brought by the State of Texas in its own courts to recover taxes and penalties from the railway company, under an act which was entitled: "An act imposing a tax upon railroad companies * * * and other persons * * * owning * * * or controlling any line of railroad in this state * * * equal to one per cent of their gross receipts * * * and repealing the existing tax on the gross passenger earnings of railroads."

Section 1 imposed upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the state."

Section 2 requires a report under oath of "the gross receipts of such line of railroad from every source whatever for the year ending on the 30th day of June last preceding" and exacts immediate payment of the tax "calculated on the gross receipts so reported." The railroad company involved was located wholly within the state, but connected with other lines; and a part of the gross receipts sought to be taxed was derived from the carriage of passengers and freight coming from or destined to points without the state. The question whether, in view of this portion of the gross receipts, the case should be governed by *Philadelphia & Southern Mail Steamship Co. v. Penn-*

sylvania or by *Maine v. Grand Trunk R'y Co.* was fairly presented and squarely met. A majority of the court, in an opinion written by Mr. Justice Holmes, declared the tax void. We have already quoted certain passages from this opinion wherein it is said that the earlier decision in 122 U. S. is regarded as "unshaken and as stating established law," and that the rule there laid down was accepted without question in *Maine v. Grand Trunk R'y.*, where "the validity of the distinction was what divided the court." Referring to the latter case, the court further said (p. 226):

> "In *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 'an annual excise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697; *McHenry v. Alford*, 168 U. S. 651, 670, 671."

Stating the rule as the court now conceived it, Mr. Justice Holmes said:

> "It appears sufficiently, perhaps, from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37; *Asbell v. Kansas*, 209 U. S. 251, 254, 256.

The application of the rule to the facts in the Galveston case was made in the following language, with which the opinion concludes:

> "We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference

from the statute taken by itself. On the contrary we rather infer from the judgment of the State court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'

Of course it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State. We are of opinion that the judgment should be reversed."

The position of the minority, headed by Justice Harlan, was not antagonistic in principle to that of the majority of the court. The dissenting opinion places the emphasis upon the words "equal to" found in the Texas law, and states that they warrant construing the law as an occupation tax, as was done by the Supreme Court of Texas. Furthermore, the dissenting opinion is to the effect that an annual occupation tax "equal to" a named per centum of gross receipts is not a tax directly laid upon the gross receipts as such, so as to come within the rule laid down in *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania.*

It seems reasonably clear that had the Texas law been framed in the language of the Minnesota law now before us, it would have received the unanimous condemnation of the court. The distinction which divided the court in the Galveston case, as well as in *Maine v. Grand Trunk Ry. Co.,* is not to be found in the Minnesota statute. It lays a tax directly upon the gross receipts. The opinion of the court in the Galveston case is apparently conclusive upon the proposition that even though there may be a logical inconsistency involved in permitting the states to tax property used in interstate commerce at its actual value as

a going concern while denying to states the right to tax the interstate business, any attempt to tax the gross receipts from interstate transportation must be held ineffectual. The drawing of the practical line, of which Mr. Justice Holmes speaks, has left this tax upon gross receipts on one side of the line, while the tax upon property under the so-called unit rule of valuation is found on the other side. Whatever may be said on the subject of logical consistency at the present day, to shift the tax on gross receipts to the other side of the line is to set aside the long series of decisions ending in the Galveston case, by which that line has been drawn.

The Supreme Court of Minnesota has sustained this tax on the theory that it is a tax upon the property of the company and not upon the earnings. It is asserted that the gross earnings were referred to merely as a measure of value for the property. Being, therefore, a property tax, it is said that no burden is placed upon interstate commerce because the right to tax property used in carrying on interstate commerce has always been conceded. In reaching the conclusion that the particular statute here involved was intended as a property tax, the Minnesota court takes into account the general history of tax legislation in Minnesota, refers to the constitutional amendment pursuant to which the statute was passed, and calls attention to similar statutes now in force taxing railroad and telephone companies on the gross earnings plan (Transcript of Record, p. 42.) The legislation affecting railroads, telephone companies, and others, we do not deem it necessary to bring specifically to the attention of this court. The telephone law is in some material respects different from the express law. *State v. Northwestern Telephone Co.*, 107 Minn. 390. The case of the railroads, for reasons which we shall hereafter

set forth, is on an altogether different footing from that of the express companies.

The contention that the tax may be sustained as one upon property brings us to the consideration of a line of cases which runs along *pari passu* with the gross earnings cases already discussed. Throughout the debate on the taxing power of the states in the light of the commerce clause of the constitution, this court has recognized an important reservation in favor of the state. While the right to burden interstate commerce or the receipts therefrom directly with taxation has been denied, the right to tax the instrumentalities or the property used in carrying on such commerce has been conceded. This was laid down as a general proposition, even in the earlier cases on the subject.

> *Delaware Railroad Tax Case*, 18 Wall. 206, 232;
> *Telegraph Co. v. Texas*, 105 U. S. 460, 464;
> *Western Union Telegraph Co. v. Mass.*, 125 U. S. 530;
> *Maryc v. Baltimore & Ohio Rd.*, 127 U. S. 117, 123, 124;
> *Pullman Co. v. Pennsylvania*, 141 U. S. 18.

The power thus conceded to the states was soon found to be one of far-reaching importance. It was not long before the power came to be extended beyond the mere right to tax at its ordinary value the tangible property within the state of corporations engaged in interstate commerce. The state was not content to tax the poles and wires of a telegraph company located within its borders at their value as so many poles and wires, but claimed the right, in valuing such property, to take into account their use as part of a system of poles and wires extending far beyond the borders of the state. And this court, not without much debate in the first instance, went to the desired limit and agreed

that the property of companies engaged in interstate commerce may be taxed, as Mr. Justice Holmes has expressed it, "at its value as it is in its organic relations, and not merely as a congeries of unrelated items." This involved, of course, an augmentation of value, by reason of the commerce in which the property is employed.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Adams Express Co. v. Ohio State Auditor, 165 U. S. 194;
Same Case, 166 U. S. 171;
Fargo v. Hart, 193 U. S. 490, 499.

In *Adams Express Co. v. Ohio*, the court said (165 U. S. 227):

> "The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute."

The rule is fully stated in *Fargo v. Hart* as follows:

> "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand it can tax property permanently within its jurisdiction, although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad, or the posts and wires of a tele-

graph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. *Western Union Telegraph Company v. Taggart*, 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases."

The local authorities immediately became so aggressive in taking advantage of the opportunities opened up by the unit rule that it soon became necessary to mark limits to its application. In the earlier cases where the rule was laid down and applied, it was assumed that the transportation system was of substantially the same value throughout, so that the division on a mileage basis would be justifiable. Only on that assumption could the rule be recognized and sustained on principle. The tax thus permitted was strictly a property tax, and the unit rule simply amounted to a method of valuing the property within the borders of the state imposing the tax. To permit the state to give the property within its jurisdiction an additional value by reason of its use in connection with other property beyond its borders, to be sure, came perilously near to an extension of the taxing power of the State, not only to interstate commerce itself, but to property located outside its boundaries. This was the extreme limit to which the court would go,

and when it appeared, as it did in *Fargo v. Hart*, that the assumption of uniform value for the entire system was false and that the total valuation used in making the apportionment on a mileage basis was made up largely from real and personal property of an express company, not necessarily used in its express business and permanently located in the state of its incorporation, which was different from that of the taxing sovereignty, the court did not hesitate to declare the tax void. Immediately following the passage which we have already quoted from the opinion in that case, is this paragraph:

> "It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus*, 154 U. S. 421, 431; *Western Union Telegraph Co. v. Taggart* 163 U. S. 1, 23. The same principle applies to personal property which the State would not have the right to tax directly. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223. In *Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus* there was reason to suspect an infraction of constitutional rights, but the Secretary of State testified that there was no assessment of property outside the State, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course if the board did not go beyond

its jurisdiction its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the Express Companies' cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account."

The reason why the tax was void in *Fargo v. Hart* was that on the facts shown the attempted application of the unit rule amounted to "taxing property outside the state under a pretense." If there is any analogy between that situation and the one before us in this case, it is that upon a parity of reasoning the tax upon the gross receipts of the plaintiff in error is a tax upon interstate commerce under a pretense. Let us consider for a moment where the State's position would land us. Our discussion of the decisions has been to little purpose, if we have not made it clear that this court has, with the emphasis of frequent repetition, declared without qualification that a tax upon gross receipts derived from interstate commerce bears so directly upon such commerce as to amount to a regulation thereof, contrary to the commerce clause of the constitution. Now, if upon the property tax theory, the validity of such a tax may be worked out, the conclusion arrived at is, as a practical matter, directly in conflict with the line of gross earnings tax cases running from *Fargo v. Michigan* and *Philadelphia & Southern Steamship Co. v. Pennsylvania* to the Galveston case. As Mr. Justice Holmes said in the Galveston case, the two classes of decisions—one permitting the taxation of the property at its actual value as a going concern, and the other forbidding the imposition of a tax upon the interstate

business—do not admit of an "absolute, logical reconciliation;" and yet, if the State's position in this case is sound, the two lines have actually converged, and upon the theory of a property tax that which was emphatically condemned as a tax upon interstate commerce must now be approved as a tax upon property. A very slight change (represented by the bracketed words) in the language of Justice Bradley in *Philadelphia & Southern Steamship Co. v. Pennsylvania* makes it pertinent here (122 U. S. 336):

> "Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you [upon your property valued on the basis of] what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The Minnesota court apparently attaches some importance to the wording of the "lieu" clause. It is contended that the Minnesota law is "fairly distinguishable from the act considered in the Galveston case." The court says (Transcript of Record, p. 44):

> "The act provides that the tax 'shall be in lieu of all other taxes upon the property of any express company * * * paying the same.'"

The state court has certainly fallen into error in quoting the law. The present statute which is set forth in the appendix to this brief gives the lieu clause as follows:

> "which shall be in lieu of all taxes upon its property."

There have been but three other statutes taxing express companies since the constitutional amendment authorizing such a tax was adopted. The first law, being Chapter 309 of the General Laws of Minnesota for 1897, states the lieu clause as follows:

> "which shall be in lieu of all taxes upon all property of any express company so paying the same."

The next law, Chapter 317 of the General Laws of Minnesota for 1899, states the lieu clause as follows.

> "which shall be in lieu of all taxes upon all personal property of any express company so paying the same."

The last law before the present revision was Chapter 124 of the General Laws of Minnesota for 1901, where the lieu clause is stated as follows:

> "which shall be in lieu of all taxes upon all property of any express company so paying the same."

We doubt whether any great weight is to be attached to the precise phrasing of the lieu clause, but, inasmuch as the clause is relied upon by the State, its correct wording should be before the court.

Attention was also called to a dictum of this court in *McHenry v. Alford*, 168 U. S. 651, 671, where it was said of a North Dakota statute imposing a gross earnings tax in lieu of all other taxes:

> "It would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

The statement in *McHenry v. Alford* was made *arguendo* and the court expressly declared that it was not necessary to decide in that case the question thus suggested. We believe the assertion to be accurate that this court has never held that a tax otherwise void may be considered valid because the statute by which it is imposed declares it to be in lieu of other taxes. On the contrary, as we have pointed out, the court in *Fargo v. Michigan* expressly held a tax upon gross earnings arising from interstate commerce and apportioned on a mileage basis to be void, even though the tax was declared by the legislature to be in lieu of all other taxes. Even if the language of the law, as it now stands, were susceptible of the interpretation that the legislature intended the tax upon gross earnings as a property tax, the problem is not solved. This court has held as recently as *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, that "the validity of a statute, whatever its language, must be determined by its effect or operation as manifested by the natural and reasonable meaning of the words employed," and that "if a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state legislature may not have intended to enact an invalid statute." In that case it was sought to show the intention of the legislature not to apply the law in question to interstate commerce by showing the course of previous legislation on the same subject. The court held that this could not be done and that the statute before the court must stand or fall by its own terms.

If the provision that the tax "shall be in lieu of all taxes upon its property" makes any difference at all, it must be upon the theory that the tax thereby becomes a property

tax. We apprehend that the clause is important only as an aid to construction, and from the point of view of the plaintiff in error in this case, the construction which the State evidently seeks to enforce with the assistance of this "lieu" clause is not of the slightest consequence. The most that could be claimed is that the clause indicates an intention to levy a tax upon property. Even if this legislative intention had been stated in so many words upon the face of the law, the situation would not be helped, if the necessary effect of the law is to place a direct burden upon interstate commerce. The validity of a tax of this character can hardly be made to depend upon any act of the State in taxing or in refraining from taxing the property of the corporation as such. If this tax imposed directly upon the gross receipts from interstate transportation is invalid as a burden upon such commerce, it cannot be any the less so because it appears to be imposed either in lieu of or in addition to another tax which might not be an unlawful burden upon interstate commerce. We respectfully submit that the State of Minnesota cannot, by merely refraining from levying the ordinary property taxes against a company engaged in interstate commerce, acquire the right to tax the interstate commerce carried on by that company. If this could be done then all restraints upon State action in this respect could be released by mere non-action, and it would become a perfectly simple matter for states to acquire a free hand in taxing such commerce. There is hardly any branch of interstate commerce which can be carried on without the use of property in some form. On the hypothesis we are discussing, all that any state need do, under such circumstances, is to neglect to tax the tangible property and then impose a direct tax upon the gross receipts arising from the business. A more glaring instance of sub-

stitution of the form for the substance could hardly be imagined. It amounts to saving the tax by giving it a name, or by casting it in a certain form.

In *Fargo v. Michigan*, 121 U. S. 230, the court said (p. 244):

> "Nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

So here, by no act of omission or commission can the State acquire the right to regulate interstate commerce any way.

The principles for which we contend were laid down with great emphasis in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and *Pullman Co. v. Kansas*, 216 U. S. 56. These cases were argued together and both decided in January, 1910. They brought before the court for determination this question: Whether a Kansas statute should be upheld which required foreign corporations, as a condition upon the right to continue to do local business in Kansas, to pay, for the benefit of the permanent school fund of the state, a given per cent of their authorized capital. It was held that, as to corporations engaged in interstate commerce, the statute was void because in effect it imposed a tax upon the interstate business of such companies, as well as upon their property situated beyond the limits of the state. The contentions which the court sustained are thus stated in the opinion by the late Justice Harlan (p. 18):

> "The contentions of the company, to which particular attention will be directed, are, in substance, that

the requirement that it pay, for the benefit of the permanent school fund of the State, *a given per cent of its authorized capital*, wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and, therefore, is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the State, a thing which could not be done consistently with the due process of law enjoined by the Fourteenth Amendment."

Referring to the Galveston case, it was said (p. 24):

"The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid, so far as it was *based on* or was measured by receipts derived from interstate transportation. That view was sustained."

The rule deduced from the previous cases was formulated as follows (p. 26):

"We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent *in fact* on the value of its property *situated within the State.*' *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696; *Leloup v. Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all

> the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, *on account of such business.*"

The argument that the state expressly disclaimed any purpose of obstructing or embarrassing interstate commerce, but sought only to prevent the companies from entering the field of domestic business without conforming to the requirements of the statute was met by this statement (p. 27):

> "But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

The effect of the Kansas law was expressed in the following language (p. 30):

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not

simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."

The general proposition that a state may prescribe the terms on which a foreign corporation shall enter and do business within its limits was squarely met. The court held that the right to exclude a foreign corporation was not absolute and that in the case of corporations engaged in interstate commerce, their right to carry on domestic business could not be conditioned upon the payment of a fee which operated as a burden upon interstate commerce or as a tax upon property beyond the borders of the state. In the cases before the court it was asserted that the capital stock represented all of the property and all of the business of each company, both inside and outside the State of Kansas. Consequently, the fee required by the law, which was measured by a percentage of the entire capital stock, was in effect a tax upon the entire business and the entire property of the companies. Such companies were held not to be bound to surrender their immunity from state taxation in reference to interstate business and property outside the state, as a condition upon continuing to carry on domestic business.

As we read the Pullman and Western Union cases, the court was unanimous in recognizing the principles laid down in *Fargo v. Michigan*, the Galveston case, and the other, decisions upon which we have commented. The only difference of opinion was as to the effect properly attributable to the condition named in the law. The dissenting opinion in the Western Union case, written by Mr. Justice Holmes, takes the position that the condition in question was not rightly to be regarded as a burden upon the interstate busi-

ness itself. The consequence was said to be the measure of the condition, and as the only consequence of a failure to comply with the condition was the surrender of the right to transact strictly local business, the condition could not, according to the minority opinion, be deemed to affect interstate commerce.

Here, again, "the validity of the distinction was what divided the court." There was no real dispute about the principles of constitutional law. That a tax upon all the capital stock of a corporation engaged in interstate commerce amounted to a tax upon the commerce itself, in exactly the same way as a tax upon the gross receipts derived from interstate commerce is a tax upon such commerce, is a proposition apparently conceded by every member of the court in the Pullman and Western Union cases. Could such a tax upon interstate commerce be made a condition for the doing of local business? The majority of the court held that it could not because the condition operated as a direct burden on interstate commerce. The minority held the condition was inoffensive because the consequence of a failure to comply affected merely the local business. In the case now pending the argument made for the validity of the tax in the Kansas cases would be impossible. This tax does not pretend to be anything more or less than a tax upon gross receipts arising from interstate transportation. The sole basis for the State's contention is that, being in lieu of other taxes, this tax must be taken as intended for a property tax. Even so, the ineluctable logic of the Kansas cases would defeat the tax. If a tax upon the capital stock of a corporation engaged in interstate commerce cannot be justified as a condition upon the right to carry on strictly local commerce, as to which the control of the State is undisputed, surely a tax levied directly upon the gross

receipts from interstate commerce cannot be justified by the fact that the State has the right to tax the property of the corporation within its borders and has refrained from doing so.

C. *The situation with respect to "intermediate business."*

Attention has been directed to the action of the Supreme Court of Minnesota in making an apportionment on a mileage basis, in the case of earnings from business carried by the plaintiff in error between points in Minnesota, but passing beyond the borders of the state in transit. An examination of the statute will show that it makes no provision whatever for any apportionment. The state court made the division of its own motion, in order to bring the case as to this item of earnings within the holding of this court in *Lehigh Valley Ry. Co. v. Pennsylvania,* 145 U. S. 192. We shall assume that this court is bound by the apportionment made by the state court, regardless of the fact that the law contains no provision for it.

The Lehigh Valley case was decided in 1891, at the same term with *Maine v. Grand Trunk Ry. Co.* The court did definitely hold that receipts of the character now under consideration, apportioned as they have been by the Supreme Court of Minnesota, were taxable by the State of Pennsylvania. *Fargo v. Michigan, Philadelphia Steamship Co. v. Pennsylvania* and similar cases were not mentioned in the opinion. Later, in *Hanley v. Kansas Southern Rd. Co.,* 187 U. S. 617 (1902), where the validity of a State Railroad Commissioner's rate between two points in the same state, but over a line running a part of the way outside the borders of the state, was involved, the court held that such transportation was interstate in such a sense as to prevent the local authorities from regulating it by fixing the rate. The Lehigh Valley case was distinguished as follows (p. 621):

> "That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145

U. S. 204. And although it was intimated that, for the purpose before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The Lehigh Valley case in our judgment is irreconcilable with either the Hanley case or the Galveston case. With all deference, we submit that, in point of principle, the regulation of an interstate rate by local authority is an interference with interstate commerce no more direct or immediate than the taxing of the proceeds derived from carrying on such commerce. The burden is not lifted or rendered less direct, nor is the principle at all affected by the fact that the state limits its tax to a proportion of the interstate earnings based upon mileage within the state. If Minnesota can tax a proportion of such earnings so arrived at, Wisconsin, Illinois and every other state may do likewise, and thus the proceeds of interstate transportation may be levied upon without limit; and the states together may by this ingenious system of taxation accomplish the very thing which every one concedes is forbidden by the constitution. It amounts to saying that, while no one state may build the wall, nevertheless each may contribute its stone, and together they may make the barrier complete.

It is idle to assert that a tax upon the income of property is here equivalent to a tax upon the property itself. There is a vast difference between taxing the income of ordinary prop-

erty of a stationary character and taxing the tolls or charges arising from the transportation of goods between the states. Commerce is commerce because it flows from one place to another. The main thing is the movement and not the tangible instrumentality which is incidentally involved therein. The income arises primarily from the value of the service performed in changing the location of the goods carried, rather than from the use of the tangible property employed in performing the service. No one would contend that the state may, by legislation, provide that the tolls received for interstate trade shall not exceed, say, 7% of the capital of the corporation carrying it on; yet if a state may levy a tax upon the receipts from such commerce, the necessary effect is to regulate the charges.

In the Galveston case the road was situated entirely within the state, and the tax was levied upon the proportion of the interstate charges accruing to it. This court held that such earnings could not be taxed by the state because they constituted a portion of the through charges. The Texas statute made specific provision for apportionment, so as to make certain that the receipts only from actual transportation within the state should be reached by the tax. Section 1 of the law, which is quoted in full in the opinion of the Texas court in the Galveston case, 97 S. W. 71, provided that all railroad corporations

> "shall pay to the state an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the state; and if such line of railroad lies partly within and partly without the state, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the state bears to the whole length of such line."

The Lehigh Valley case and the Galveston case seem to us absolutely inconsistent. The only conceivable distinction on the facts is that in the Lehigh Valley case the transportation was between two points in the same state, but passing through another state en route, while in the Galveston case the transportation was between two points in the same state as one link in the chain of interstate transportation. Certainly there can be no real difference, so far as the interstate commerce problem is concerned, between a shipment which goes from one state into another and back again and a shipment which goes from one state to another and remains there. We submit that the only safe and consistent rule is the one which has been laid down so many times. Let the state tax the property situated within its limits; but let it not, in the slightest degree, place a tax upon the tolls of interstate transportation. Just as surely as on any pretext whatever the state is permitted to tax any part of the receipts of interstate commerce, just so surely does the state acquire the right to burden the commerce itself. No pretext should be regarded as sufficient to justify ignoring the plain mandate of the constitution that such receipts shall not be burdened with taxation.

It was long ago decided that taxation is an absolute power which acknowledges no other limits than those expressly prescribed in the constitution. *M'Culloch v. Maryland*, 4 Wheat. 415. If the power be once conceded, it may be exercised without restraint. It is an attribute of sovereignty which may be exercised so as to destroy. If the states may tax the receipts from interstate commerce or any portion thereof, no matter what the pretext, they may do so with an uncontrolled discretion. Yet, upon the argument made here, this tremendous power may be acquired by the state with perfunctory simplicity. The in-

sertion in the taxing statute of the words "in lieu of other taxes" confers the power. We cannot believe that the door to state regulation of interstate commerce can thus be opened.

The attention of the court should perhaps be called to one other group of cases.

The Minnesota gross earnings tax upon railroads has resulted in litigation which has reached this court.

Stearns v. Minnesota, 179 U. S. 223;
Great Northern Railway Co. v. State of Minnesota, 216 U. S. 206;
Chicago Great Western Railway Co. v. State of Minnesota, 216 U. S. 234.

In none of these cases, however, has the question now brought here for determination been raised. The controversy between the railroad companies and the State has in each instance turned upon the question whether the railroad company had an irrepealable contract with the State for a commuted tax. In the early days of its history the State undertook to make contracts with the railroad companies involving, among other things, the acceptance by the State of a certain percentage of gross earnings in lieu of all other taxes. The validity of later legislation raising the rate of taxation upon railroad gross earnings was questioned by the railroads as an impairment of the original contracts for the commuted tax. In all of these cases the railroad companies have specially claimed under their respective contracts and have merely contended that subsequent legislation was an impairment of the obligation thereof. Neither party to these cases, at any stage of the proceedings, raised the question of the tax being in viola-

tion of the commerce clause of the Federal Constitution; and naturally there was no suggestion of the question in the opinions of this court or of the state court in those cases.

Respectfully submitted,

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APPENDIX.

Revised Laws of Minnesota, 1905, Chapter 11.
Taxes—Express Companies.

§1012. *Definition*—Every person, company, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silver plate, or other articles, by express shall be deemed to be an express company. ('97 c. 309 s. 1).

§1013. *Annual statement*—Annually between January 1 and February 1, every such express company doing business in this state shall make and file with the state auditor a statement in such form as he may prescribe, verified by the person constituting such company, if a person, or by its president, secretary, treasurer, superintendent, or chief officer in this state, if an association or corporation, containing the following facts:

1. The name of the company.
2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and postoffice address of the president, secretary, auditor, treasurer, and superintendent or general manager.
5. The name and postoffice address of the chief officer or managing agent of the company in this state.
6. The entire receipts, including all sums earned or charged, whether actually received or not, for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies.
7. A statement of the amount actually paid by such express company for the year then next preceding December 31 to the railroads within this state for the

transportation of its freight within this state showing the amount paid to each railroad company.

8. The entire receipts of the company for business done within this state, as defined in subd. 6, after deducting the amounts paid for transportation of freight, as in subd. 7.

On application the auditor shall furnish blanks for making such statements. ('97 c. 309 s. 2).

§1014. *Local agent to make statement, when*—If any such company shall fail or refuse to make such report on or before February 1, the auditor shall notify its local agent of such default, by letter mailed and addressed to such agent at his postoffice address, inclosing a form of return to be made out by him; and thereupon it shall be the duty of each such agent within this state, on or before March 1, to make out and file with the auditor his verified statement, containing such of the facts prescribed in § 1013 as the auditor may require, but the statement of gross receipts, and the deduction therefrom, defined in § 1013 subds. 6, 7, shall include only those of his agency. ('97 c. 309 s. 3).

§1015. *Auditor to determine gross receipts*—The auditor shall annually, between March 1 and April 1, ascertain and determine the gross receipts of every such company by deducting the sums annually paid by it for transportation of freight, as defined in § 1013, subd. 7, from its entire receipts for business done in this state, as defined in § 1013, subd. 6. In case of the failure or refusal of any company or its agents to make the statement required by law, the auditor shall inform himself as best he may on the matters necessary to be known in order to discharge his duty under this section. At any time before March 1 in each year, or before the gross receipts have been determined as hereinbefore provided, any company or person interested may, on written application, appear before the auditor and be heard in the matter. ('97 c. 309 s. 4).

§1016. *Failure of company to report*—If any company required to file a statement under § 1013 omits

to file the same on or before February 1, such company shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars for each day's omission to file the same after February 1, to be recovered by action in the name of the state, and paid into the state treasury to the credit of the general revenue fund. On request of the auditor, the attorney general shall institute such action against any company so delinquent in any county in which such company does business, or in the county of Ramsey. ('97 c. 309 s. 5).

§1017. *Failure of agent*—If any local agent required to file a statement under § 1013 fails to do so on or before March 1, he shall be guilty of a misdemeanor, and punished by fine of not less than twenty-five dollars. Each day's failure after March 1 to file such statement shall constitute a new offence. ('97 c. 309 s. 5).

§1018. *Power of auditor—Failure to answer*—The auditor may require the president, secretary, treasurer, receiver, superintendent, or managing agent or other officer or employee or agent of an express company to attend before him and bring for the inspection of the auditor any books or papers of such company in his possession or custody or under his control, and to testify under oath touching any matter relating to the organization or business of such company. Any such officer, employee, or agent who shall refuse to attend before the auditor when so required, or shall refuse to bring with him and submit for such inspection any such books or papers, or shall refuse to answer any question put to him by the auditor touching the organization or business of such company, shall be guilty of a gross misdemeanor, and punished by fine of not more than five hundred dollars, or by imprisonment in the county jail not more than thirty days, or by both. ('97 c. 309 s. 5).

§1019. *Collection*—On or before March 15, annually, the auditor shall assess upon each company a tax of six per cent. upon its gross receipts for busi-

ness done between points within this state for the preceding calendar year, as determined by the auditor, which shall be in lieu of all taxes upon its property, and shall deliver to the state treasurer for collection a draft upon the company for such sum. Such tax, when collected, shall be credited to the general revenue fund. ('97 c. 309 s. 6; '99 c. 317; '01 c. 124).

§1020. *Penalty for non-payment*—If any such company shall fail to pay such tax within sixty days after demand of the state treasurer, he shall add thereto a penalty of ten per cent. thereof, and thereafter one per cent. thereof for each subsequent month in which such tax remains unpaid. ('97 c. 309 3.6; '99 c. 317; '01 c. 124).

§1021. *Distraint*—If such default shall continue for sixty days after demand, the treasurer shall distrain enough of the personal property of such company to satisfy such tax and penalty, and shall sell the same if not paid before sale, or so much thereof as may be necessary to pay such tax, penalty, and cost of distress, publication, and sale, at public vendue, upon not less than ten days' published notice in two legal newspapers of Ramsey county. ('97 c. 309 s. 6; '99 c. 317; '01 c. 124)."

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(22784)

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 708.

Office Supreme Court
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JAMES H. McK

UNITED STATES EXPRESS COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE T. SIMPSON,
Recently Attorney General;

LYNDON A. SMITH,
Attorney General;

WILLIAM J. STEVENSON,
Assistant Attorney General;
For Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

A writ of error brings to this Court the record of an action prosecuted to final judgment in Minnesota. Minnesota v. United States Express Company, 114 Minn. 346. This final judgment was to the effect that the plaintiff in error must pay a tax upon its property in Minnesota measured by six

per cent. of its gross earnings, including, (A), the earnings in Minnesota for the carriage in Minnesota of articles which are transported from one point in Minnesota to another point in Minnesota, but through another state for a part of the route of its transportation; (B), the earnings in the State of Minnesota derived from the transportation of articles received in Minnesota and carried wholly in Minnesota, to a point in Minnesota, which articles were either received from a connecting carrier bringing such articles from without the state, or delivered to such a carrier for transportation beyond the state line; and, (C), certain receipts from the sale of money orders in the state.

Class (A), of earnings, are commonly called "Intermediate Business"; class (B), "Interstate Transfer Business and Tonnage Revenue"; and, (C), "Money Order Business." These terms will be used more or less in this brief to designate the various classes of express business referred to.

The only transportation business of express companies from which receipts are considered in the computation of the tax on express companies, is business, (A) wholly intrastate, (B), "intermediate business," and, (C), "interstate transfer business and tonnage revenue." From the total of the receipts from these kinds of transportation business, the amounts paid railroads for transportation, are deducted before this tax is computed. (See transcript of record, p. 24.) This is about one-half the total receipts from transportation business. No gross earnings are considered which are earned by

the carriage across a state line of articles by the express company taxed.

The express company earnings derived from the carriage of business by it into, through or out of the state, are *not* included.

The Only Tax Imposed.

This tax levied and collected annually by the State of Minnesota upon the property of the express companies, the value of which is measured by its income, is the only tax of any nature whatsoever imposed upon either the company or its property. Hence, it is commonly stated that it is exempt from all other taxes and assessments locally and otherwise. The only contribution that the express company makes to the expense of local government and the protection given it by the state and its subordinate municipalities, is this tax measured by a proportion of its gross earnings.

Intermediate Business.

The first question raised in the order of the presentation of the questions involved in this case, is as to whether or not anything from "Intermediate Business" may be considered in assessing a tax upon an express company. The case of Lehigh Valley Railway Company v. Pa., 145 U. S. 192, seems to counsel for Minnesota to answer this question in favor of the state. It was so held by the Supreme Court of Minnesota in the opinion given in the transcript of the record, page 41, folio 76. (See also appendix (A) of this brief.

Interstate Transfer Business and Tonnage Revenue.

The main question in this action is as to whether or not the Constitution and Laws of the State of Minnesota which provide for the method of measuring the property of the plaintiff in error for taxation purposes are in conflict with the Constitution of the United States, and particularly with that part of the Constitution of the United States which gives to Congress the control of commerce among the several states. The Constitution of Minnesota, upon which the taxing statute attacked by plaintiff in error was based, so far as here material, provided that:

> "The legislature may impose, or provide for the imposition of, upon the property within this state of any and all owners or operators, whether corporate or individual, or otherwise, * * * of all express companies, or owners, or any or either of the same, doing business in this state, * * * a tax, as uniform as reasonably may be with the taxes imposed upon similar property in said state, or upon the earnings thereof within this state, but may be graded or progressive, or both, and in providing for such tax, or in providing for ascertaining the just and true value of such property, it shall be competent for the legislature, in either or all of such cases, to impose such tax, upon any or all property thereof within this state, and in either case by taking as the basis of such imposition the proportionate business, earnings, mileage or quantity of production or property now or hereafter existing of any such companies, persons or owners, transacted or existing in this state, in relation to the entire business, mileage or quantity of production or property of such companies, per-

sons or owners as aforesaid; or in such other manner, or by such other method as the legislature may determine * * *."

Paragraph 17, Article IX, Constitution of Minnesota. Article adopted November 3, 1896.

Pursuant to the amendment to the Constitution hereinbefore quoted an act was passed in 1897 by the Legislature of Minnesota (Chapter 306), providing for the taxation of the property of express companies, an amount equal to and measured by 3 per cent. of the gross earnings of such companies. The per cent. was increased to 5 per cent in 1899, and to 6 per cent. in 1901.

This percentage is not applied to the entire gross earnings, but only to such earnings after deducting the payments made by the express companies to the railroad companies for transportation, which payments amount to approximately one-half of the earnings of the express company, so that the express companies pay an amount equal to about three per cent of their gross earnings.

The taxes in question in this case were levied, assessed and measured for the most part under the law of 1901. The substance of this law is to the effect that every express company shall annually make and file with the State Auditor, a statement including the amount of the entire receipts for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies. Each year the Auditor of the State

determines the gross receipts of each express company, and assesses "upon each company, a tax of 6 per cent. upon its gross receipts for business done between points within this state for the preceding calendar year, as determined by the Auditor, which shall be in lieu of all taxes upon its property."

Revised Laws of Minnesota for 1905, Sections 1013, 1015 and 1019. (See Appendix B of this brief.)

Pursuant to the Constitution and the law passed in pursuance thereof, the taxes in question in this case were assessed against the plaintiff in error, and such taxes to the extent shown by the transcript of Record in this case, have not been paid by the plaintiff in error, and the plaintiff in error claims that the taxes are rendered void by an alleged interference of the law under and by virtue of which they were assessed, being in conflict with the interstate commerce clause of the Federal Constitution.

The claim of the state is that these taxes are taxes upon the property of the plaintiff in error, and are simply measured by the amount of certain gross earnings of defendant; that this method of levying a tax upon the property of the defendant is pursuant, not only to the Constitution and laws of the State of Minnesota, but also to a system of taxation which has been in vogue to a greater or less extent in the state throughout its entire existence, which system has been approved by the decisions of Minnesota, and as far as the taxation of railroads in this manner is concerned, recognized

at least by this court, as a legitimate method of taxation.

Stearns v. Minnesota, 179 U. S. 223.

Great Northern Ry. Co. v. Minnesota, 216 U. S. 206, 233.

Chicago Great Western Railway Co. v. Minnesota, 216 U. S. 234.

One of the statements of this court within which Minnesota claims that this tax comes, is as follows:

> "Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 696-697.

Counsel for Minnesota do not understand that there is any question raised by plaintiff in error as to the equivalence of the tax in question, to a tax upon its property measured by the value thereof, nor does plaintiff in error anywhere challenge the fairness and reasonableness of the method, or the amount of tax assessed against it by the State Auditor of Minnesota.

Review of so-called Gross Earnings Tax Laws in Minnesota.

The method of taxing property by the so-called gross earnings tax, began in Minnesota in a small way while it was yet a territory. Of the earlier development of this method of taxing property of railroads, the late Mr. Justice Jaggard says:

> "During the period in which Minnesota was a territory, railroad companies in considerable number were organized and operated under legislation which substituted, for ordinary taxes, a tax on gross earnings, resulting in a final tax of three per cent. on gross earnings, as a substitute for, and in lieu of, other kinds of taxes. * * * There have been seven stages in the final development of the law, namely: (1) Territorial laws were enacted in 1854 (et circa), creating territorial charters. (2) The State Constitution, adopted in 1858, contained provisions requiring taxes to be equal and uniform, and levied according to a cash valuation of property taxed, and exempting certain kinds of property from taxation (article 9, Sections 1, 3); and incorporating the congressional enabling act of 1857 (11 Stat. 166, 167) expressly recognizing such exemption of United States lands (article 2, section 3). (3) Thereafter, in 1865 (et circa). there were a series of special laws consequent upon the financial condition of the various roads, designed to facilitate the resumption of construction; providing for the payment of one per cent. tax on gross earnings during the first three years after the completion of the first thirty miles of road, and of two per cent. during the seven years next ensuing, and of three per cent. thereafter; and modifying taxation as to lands sold or conveyed. (4) In addition to the original congressional land grants, there were a number of additional ones, subsequent to the adoption of the state con-

stitution in 1864 (et circa). (5) Then followed, in 1871, an important constitutional amendment affecting subsequent legislation as to railroad taxation. (6) A special law of 1873 extended the exemption to many other companies. (7) And in 1887 the legislation brought within the provision, in effect, all roads not previously subject to the commuted system of taxation."

Jaggard on Law of Taxation, pages 72-73.

In 1896 the amendment to the Constitution of Minnesota hereinbefore set forth, was adopted. Many laws were soon afterwards enacted in accordance with and in pursuance of said amendment. A commutation tax of two per cent upon such proportion of the capital stock of freight line companies as is used or employed upon railroads in Minnesota, was passed in the session of the Minnesota Legislature of 1897, Chapter 160; also the law taxing the property of sleeping and parlor car companies three per cent. upon their gross receipts, Chapter 159; also a law taxing the property of telephone companies three per cent. on their gross receipts, Chapter 314; also a law taxing the property of express companies to the amount of three per cent. upon their earnings, less certain deductions, Chapter 309. This law was amended in 1899, and again in 1901, principally for the purpose of increasing the rate of taxation.

The Supreme Court of Minnesota has frequently considered and construed these and similar laws, and invariably has held that they impose a tax not on the gross receipts, but on the property of such persons as are so taxed. This Court, before

which this action is now pending, has once reviewed the leading cases that had been decided by the Supreme Court of Minnesota up to 1900, relative to the taxation of property by the gross earnings commutation system.

Stearns v. Minnesota, 179 U. S. 223.

We may properly quote from this case certain statements made on pages 233-238, as follows:

> "It may be well to notice the decisions of the Supreme Court of Minnesota prior to the one challenged in this proceeding. In Railroad Company v. Parcher, 14 Minnesota, 224, it appeared that a railroad charter had been granted by the territorial legislature, containing, among other things, a provision similar to the one in question, commuting all taxes on the basis of three per cent. on the gross earnings. The company having defaulted in its contract, foreclosure proceedings were had, and its property, franchises, etc., were brought in by the State. All this was done in pursuance of express statutory provisions. * * *
>
> In County of Hennepin v. Railway Company, 33 Minnesota, 534, 535, the court said:
>
> 'This is not an immunity from taxation, but a commutation of taxes—another and substituted way prescribed by law, in which the respondent, as the owner of this land among other property, is to contribute its share to the public revenue.'
>
> And in County of Ramsey v. Railway Company, 33 Minnesota, 537, 542:
>
> 'It was not in reality a plan for *exempting* property from taxation, but a substituted *method* of taxation. It must be supposed that it was contemplated that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them.'

So also in County of Todd v. Railway Company, 38 Minnesota, 163, 165:

'It has been considered that the purpose of such statutes has been, not to exempt property from taxation, but to provide a substituted method of securing to the State is proper revenue from the taxable property of these corporations. City of St. Paul v. St. Paul & Sioux City R. R. Co., 23 Minn. 469; County of Hennepin v. St. Paul, M. & M. Ry. Co., 33 Minn., 534, 535; County of Ramsey v. Chicago, Mil. & St. Paul Ry. Co., supra.'

And further, in St. Paul v. Railway Company, 39 Minnesota, 112, 113:

'As was said in Ramsey County v. Chicago, Mil. & St. Paul Railway, supra, these charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the State will be equivalent in its results to taxation of the property.'

And again, in State v. Luther, 56 Minnesota, 156, 160:

'It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although derived wholly from the former, is a commutation tax alike on both.' "

It may be proper to call the attention of the Court next to some of the decisions of the Minnesota Supreme Court since 1900, relative to the nature of the so-called gross earnings tax.

In Minneapolis & St. L. Railroad Company v. Koerner, 85 Minn. 149, the Court said on page 150:

> "It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax, but, for the purpose of certainty, was intended to change the method of computation. The amount required to be paid still remains a tax upon the railroad property, and not against the corporation. It is often referred to as the commutation tax."

In State v. Western Union Telegraph Company, 96 Minn. 13, the Court held a law nominally taxing the gross earnings of telephone companies, constitutional, as against the objections among others that it interfered with interstate commerce. (Page 24.)

The Court says on page 24:

> "While the freedom of interstate commerce from interference by the state governments has been jealously guarded, the federal Supreme Court has completely and repeatedly sustained the economic propriety and constitutional validity of valuing the property of concerns engaged in interstate business as a unit, and of taxing by each state that proportion of the whole which such state protects. Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695, 15 Sup. Ct. 268, 360; Pittsburgh Ry. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90; Adams Exp. Co. v. Ohio, 165 U. S. 194, 220, 17 Sup. Ct. 305; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup Ct. 121; Cleveland, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. 1122; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 15 Sup. Ct. 896."

In State v. Twin City Telephone Company, 104 Minn. 270, it is held that the constitutional amendment of 1896 hereinbefore quoted, was an extention of the then existing system of taxing by a per cent of gross earnings, and did not change or modify the same, but only applied it to the persons corporate or otherwise named in such amendment; and also that a law passed in pursuance of such amendment taxing telephone companies through the gross earnings system, was valid.

The Court said among other things (page 286):

> "We have had for many years, a gross earnings system of taxation as to railroad companies, and it has proved on the whole satisfactory, equitable and just, both to the state and to the corporations thus taxed. The system has always been well known, and well understood by the people. It is in particular effect the substitution of a tax upon the earnings for a tax upon the property producing it. Under it all property owned, held and used by the railroad company in the conduct of its business, is and always has been, exempted from general taxation."
>
> "A careful consideration of the question leaves no serious doubt but that the Legislature and the people intended by the change in the law to extend the well-known system of gross earnings taxation to other corporations without change or modification." (Page 287.)

In State v. Northwestern Telephone Exchange Company, 107 Minn. 390, 399, it is said:

> "The gross earnings tax is a system by which the amount of tax upon the property is determined by a method which has generally been found equitable and satisfactory. It is a tax upon the property and not upon the corpora-

> tion. * * * The State has the constitutional right to impose a tax upon the property within its borders regardless of the use to which it is devoted by its owners, and, as a method of determining what is a fair and equitable property tax, it may permit the tax to be commuted on the basis of a fixed percentage of the gross earnings of the property."

The State urges that the decisions of this Court have been such as to justify the statement hereinbefore quoted from the opinion of the Minnesota Supreme Court in the case of State v. Western Union Telegraph Company, 96 Minn. 13, and that this Court has never held that a state may not impose, in lieu of all other taxes, as a tax upon the property of a carrier, a tax measured by a certain percentage of the gross earnings, and nominally designated as a tax of that amount upon the gross earnings of such common carrier, even though there were included in the gross earnings of such carrier for the purpose of measuring taxation, certain gross receipts paid to it for the transportation within such state, of articles constituting interstate commerce.

In the case of McHenry v. Alford, 168 U. S. 651, 671, this Court said:

> "When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods, was not in reality a tax upon the gross earnings, but was a tax upon the land and other property of the company, and that the method adopted of arriving at the sum

> which the company should pay as taxes upon its property, was by taking a percentage of its gross earnings."

This brings us to a consideration of the cases decided by this Court which seem to us to sustain the right of the state to impose such a tax upon common carriers.

Decisions of this Court.

Minnesota's system of taxing Express Companies is only a property tax and is not an interference with interestate commerce within the holdings of this Court.

In Western Union Telegraph Company vs. Massachusetts 125 U. S. 530, it was held that a tax on the capital stock of a foreign corporation proportioned to the entire stock as the mileage in the state is proportioned to the total mileage, is constitutional. Such a decision recognizes the principle that a tax upon the property of a corporation may be measured not only by the actual value of tangible property, but by a proportionate mileage system. The presumption is that mileage has a uniform gross earnings capacity, and that therefore the measure of a tax by mileage is the same as the measure of a tax by gross earnings, and that if one is valid, the other is equally so. Earnings even more certainly reflect taxable value than mileage of telegraph wires do.

The Court there said on page 552:

> "The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state, and the proportion of the length of its lines in that state to their entire length throughout the whole country, is made the basis for ascertaining the value of that property."

This Court is not particularly concerned with the accuracy of the rule which the state may adopt for ascertaining the value of the property within its borders, and as was well said in the case last above mentioned (page 553):

> "We do not feel called upon to defend all of the items and rules by which they arrive at the taxable value on which its ratio of percentage of taxation should be assessed, and * * * we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein and doing business within its territory whether organized under its own laws or those of some other state, and since the principle is one which we cannot pronounce to be and unfair or an unjust one, we do not feel called upon to hold a tax void because we might have adopted a different system had we been called upon to accomplish the same result."

In Pullman Palace Car Company v. Pennsylvania 141 U. S. 18, a similar proposition was sustained, and the rule holds that if one commuted tax may be measured by a standard which is in effect the

same as a gross receipt standard, a gross receipt tax would be constitutional.

In this case the Court was considering the validity of a statute which imposed a tax in Pennsylvania on the proportion of the capital stock of an Illinois corporation, that the railroad mileage used by the corporation in the former state bore to the entire railroad mileage used by the corporation taxed. The method adopted for ascertaining the value of the cars and other property of the corporation does not commend itself as the most exact system that can easily be devised, yet it was readily sustained by this Court. It is apparent that the car mileage made by the Pullman cars in Pennsylvania as compared with the car mileage made by such cars elsewhere would be a much truer criterion of the value of the property regularly and habitually within Pennsylvania.

It is there said:

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation of the right of transit of persons or property through the state to other states or countries. The tax is imposed equally in corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital stock of the corporation on account of its property within the state is in substance and effect a tax on that property."

If such a tax which is expressly levied upon a proportion of the capital stock of a foreign corporation is thus considered to be the taxing of prop-

erty having its situs in the state, where even the method of determining such proporition does not even approximate accuracy. Surely a tax on property within the state measured by a proportion of the gross income of that property within the state, must also be considered to be a tax upon that property, and not strictly speaking, an earnings tax.

In Massachusetts v. Western Union Telegraph Company, 141 U. S. 40, it is again held that the mileage proportion might be validly applied to taxes when the taxes so measured were a substitute for direct taxation.

In Maine v. Grand Trunk Railway Company, 142 U. S. 217, a franchise tax upon a railroad was held to be properly measured by the relative amount of mileage in a state.

The court said:

> "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

Minnesota bestows the privilege of protection to the business and property of the plaintiff in error in the State of Minnesota, and therefore had a right to determine the amount it would charge for such protection, by the gross earnings mode of measurement, especially in view of the fact that the amount and equity of the tax are unchallenged in this action.

In Lehigh Valley Railway Company v. Pennsylvania, 145 U. S. 192-201, a tax was determined

to be valid which related to receipts for the transportation of articles received and delivered in the state but which passed through another state enroute.

In Postal Telegraph Cable Company v. Adams, 155 U. S. 688, it was held that a tax graduated according to the amount and value of the company's property measured by miles, and being in lieu of taxes directly levied on the property, is a tax which it is within the power of the state to impose and does not amount to a regulation of interstate commerce, or put an unconstitutional restraint thereon.

In Pittsburg, Cincinnati, Chicago & St. Louis Railway Company v. Backus, 154 U. S. 421, this Court held that a state might take into consideration the entire value, including the earning power of a railroad, when assessing taxes against this property. It quoted the following sentence among others, from its opinion in Columbus Southern Railway v. Wright, 151 U. S. 470, 479:

> "The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and *gross earnings* in connection with its capital stock."

This case was followed by another, considering a similar question in which this court said:

> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of

> using the property, but rests solely upon the value, but the value of property results from the use to which it is put, and varies with the profitableness of that use present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. * * * It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule, property engaged in interstate commerce, is controlled the same as property engaged in commerce within the state."
>
> Cleveland, etc. Ry. Co. v. Backus, 154 U. S. 439, 445.

The difficulty of taxing express companies has been many times recognized by this Court, and it has been invariably held that the tax of its specific property that might be found within the borders of the state, valuing it without reference to its connection with the entire system, is wholly inadequate, and that even the taxing of all of its physical property as a unit is still pitifully inadequate because its intangible property would thereby escape its just share of the burdens of government. This practical view of the situation was first recognized in Pacific Express Company v. Seibert, 142 U. S. 339, 353-354.

It is there said:

> "Railroad companies pay taxes on their roadbeds, rolling stock and other tangible property, as well as generally upon their franchise, and steamboat companies likewise pay a tax upon their tangible property. This tax is not neces-

> sarily an ad valorem tax at the same rate as is paid on other private property in the state belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates according to the will of the Legislature. On the other hand, *express companies* such as are defined by this act have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all, unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions and under similar circumstances."

In Adams Express Company v. Ohio, 165 U. S. 194, the subject of taxing express companies was considered, and it was there held that the property of railroad, telegraph and sleeping car companies in the several states through which they pass, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which such property was put, and all of the elements making up its aggregate value, citing many previous decisions of this Court. It was there ably argued and held that following the same analogy, the property of express companies should be considered as a unit because of the unity of use, and that such unity of use was more controlling than physical unity, or unity of ownership.

It was there emphasized by the Court that the earnings of the express companies showed a value of property greatly in excess of the actual value

of its tangible assets, and conclusively assumed that the earnings accurately reflected the value of the property, both tangible and intangible. The opinion goes even further and holds that regular income is what fixes market value, and that any other test or estimate of value must yield to the inexorable test of earning capacity.

That opinion quotes with approval from the case of Sanford v. Poe, 37 U. S. App. 378, 395, decided by Judge Lurton:

> " 'The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property though the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument. * * *
>
> 'Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any Federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the State of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no Fed-

> eral restriction which will prevent such property from being 'assessed at the value which it has, as used, and by reason of its use.'
>
> 'That an express company owns no line of railway and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business.'"

In Adams Express Company v. Ohio, 166 U. S. 185, which is the opinion rendered on the petition for a rehearing of said case reported in 165 U. S. 194, the Court more fully discusses the intangible property of express companies and the justice of assessing it.

The Court says, page 220:

> "Now it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale, it is also worth for the purpose of taxation."

And on page 222:

> "But what a mockery of substantial justice it would be for a corporation whose property is worth to its stockholders for the purpose of income and sale, sixteen million eight hundred thousand dollars, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market to the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income or for purpose of sale."

It should be remembered in this case, Ohio was taxing the express company not only for the tangible property within the state, but for the intang-

ible value of property which was ascertained by considering the earnings not only within the state, but upon the entire system of which the state property was a part.

In Adams Express Company v. Kentucky, 166 U. S. 171, a Kentucky statute was being construed. That statute provided that every corporation or like association having or exercising any special or exclusive privilege not possessed by an individual, should pay in addition to the other taxes imposed upon it by law, an annual tax to the local municipality, using the words "franchise," "franchises" and "corporate franchises," but this Court construed the statute as a whole and held that even such a tax was a tax on property, tangible and intangible within the state, and therefore valid.

In Wisconsin & Michigan Railway Company v. Powers, 191 U. S. 379, it was held by an undivided court that interstate earnings earned within the state by a railroad company might be included in the state earnings for the purpose of using such combined earnings as the measure of the value of the property of the railroad company within the state, for taxation purposes.

The Court there said:

> "In form the tax is a tax on 'the property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The prima facie measure of plaintiff's gross income is substantially that approved in Maine v. Grand Trunk Railway Company, 142 U. S. 217."

And this holding was quoted with approval and relied upon by the Court as a precedent in Galveston, Harrisburg, etc. Railway Company v. Texas, 210 U. S. 217, in which case the Court said:

> "A tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income computed by adding to the income derived from business within the state, the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried."

This recognizes the right to consider interstate earnings in arriving at the value of the property and to pro rate such earnings to the state upon a mileage basis. The correctness of this rule since it was enunciated in Maine v. Grand Trunk Railway Company, 142 U. S. 217, has never been questioned by this Court, and has been most consistently applied to all subsequent problems where it was claimed that the tax was an interference with interstate commerce.

Discussion of Authorities Relied Upon by Plaintiff in Error.

Plaintiff in error has cited and discussed in its brief certain decisions of this Court which it claims tend to sustain its position and to hold that this Minnesota tax is an interference with interstate commerce. A careful analysis of these decisions and a study of the statutes which they construe, shows that they are entirely consistent with the decisions previously cited in this brief of the State of Minnesota, and are not in any respect contrary to the position the State of Minnesota takes in this case.

This position is that this Minnesota tax is a property tax measured by a certain per cent of a part of the earnings of the plaintiff in error within Minnesota.

In Telegraph Company v. Texas, 105 U. S. 460, it was held that a tax imposed by the state, of a certain amount on every message sent by a telegraph company, was invalid. This was held to be a tax on interstate commerce, *because*

> "the tax is the same on every message sent, and because it is sent without regard to the distance carried or the price charged. * * * Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business."

This holding and these reasons are quoted with approval and further amplified in Western Union

Telegraph Company v. Massachusetts, 125 U. S. 549. It will be seen at a glance that a tax of one cent on every message sent by the company could not possibly be a property tax or have the remotest relation to the value of the property of the telegraph company in the state. Such message tax did not purport to be a property tax, but was an *additional imposition* on the business of transmitting telegrams.

In addition to this, all of the real and personal property of the company within the state was taxed in the ordinary ad valorem manner.

In Moran v. New Orleans 112 U. S. 69, a city ordinance was held invalid which required the payment of a fee for a license to operate a boat from the sea to the city port in coastwise or interstate commerce. The reason for such conclusion is stated as follows on page 74:

> "But the license fee in the present case is not a tax upon the boats as property according to any valuation. The very law authorizing its imposition, declares that it shall not be construed to be a tax on property."

It will be again observed that the fee exacted by the ordinance was not a property tax, nor in the nature of a property tax, but was an additional and independent imposition.

Fargo v. Michigan, 121 U. S. 230, is likewise easily distinguishable. The Michigan statute here under consideration was plainly a "tax upon business" or species of occupation tax. It was so construed by the Michigan state court to which a writ

of error issued in that case. See Fargo v. Auditor General, 57 Michigan, 598, 606.

The state court there says:

> "It is a tax upon business done in the state."

Both the title of the act in question and the body thereof, clearly indicate both by letter and spirit that it is a tax on those *engaged in business.* The opening language of that act is as follows:

> "That every person, co-partnership, corporation, association, car loaning company, or fast freight line, *engaged in the business* of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes in this state on their gross receipts, who are, *or may hereafter be engaged in the business* of carrying passengers ,etc."

It is true that this act also provided that such taxes shall be in lieu of all other taxes upon the cars used for the purposes mentioned, but when it is remembered that the cars to which it was attempted to be made applicable were fast freight line cars of a foreign corporation which had no place of business in Michigan, and merely allowed its cars to be hauled through the state by railroad companies which might have them in their possession from time to time as the necessities of commerce required, it is easy to understand that such property prima facie, *had no situs in the state for taxation purposes.* It is significant that this court held this Michigan statute unconstitutional merely as it has been applied by the Michigan Supreme Court, which as shown by the quotation above, was

so applied as a "tax upon business done in the state." The last sentence in the opinion of this Court in Fargo v. Michigan, is this:

> "The result is so clearly against the statute of Michigan as applied by its Supreme Court, that we think the judgment of that court cannot stand."

Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326, is a case where the court was considering the validity of a statute as applied to a steamship company doing business entirely outside of the state, and merely calling at a port within the state. It is clear that its property therefore had no taxable situs in the state, and of course, its earnings either within or without the state would in no sense reflect the value of its property within the state if it had none. Neither could it be said that this tax was any attempt either in good faith or otherwise, to impose a property tax upon any basis relating to value of state property.

Ratterman v. Western Union Telegraph Company, 127 U. S. 411, considered the question which was certified to this Court by a divided Circuit Court as to the right of Ohio to levy a tax upon the receipts of the telegraph company derived partly from interstate traffic. This also was a tax additional to the regular property tax upon realty and personalty, and was therefore prima facie a burden upon interstate commerce and void. That is the underlying reason for the conclusion reached in this case. The easy distinction is there pointed out between taxing property in the state, and tax-

ing the business which is conducted by the use in part of that property.

In Fargo v. Hart, 193 U. S. 490, the Indiana statute which imposed a tax on an express company on the proportion of the value of its total property which bears the same ratio as its Indiana mileage bears to the total mileage covered by the company, was held unconstitutional, but only because it was there shown by the express company that of its total property of twenty-two million dollars, seventeen million and a half was not connected with or used in the business, and was wholly outside of the state, and that it had paid its local taxes on all of its property in Indiana, which property was worth only eight thousand dollars, and the Indiana assessment was on a valuation of eight hundred and nine thousand dollars. Such a showing of the facts and the demonstration of the gross injustice that the application of the valuation rule worked, left no other conclusion for this Court than that it was an attempt to tax property outside of the state under a pretense.

The Court there says on page 499:

> "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other

parts of the system, that fact may be considered by the State, in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. Western Union Telegraph Company v. Taggart, 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases."

In this case at bar there is no showing whatever that Minnesota's rule for determining the value of the taxable property works an injustice or that the application of it proves its fallacy, or that it is not enacted or administered in the spirit of a property tax.

The stipulation of facts found on pages 12-16 of the Transcript of Record, shows nowhere that the express company claims to have even less tangible property, to say nothing of the intangible, than would warrant the assessment and the tax which it is now disputing. That stipulation on page 13, folio 23, says that the company did not

own "any means or instrumentalities of transportation except the wagons used by it for collecting the goods of shippers at their residences or places of business, and transporting the same, etc.," but there is no attempt to show that it did not own other property, or the value of such instrumentalities. On page 15, folio 27, in stating the facts concerning the money order business, it shows that the money received by the agents from the sale of orders, becomes a part of the money on hand at the offices of such agents, and that the agents account to the company from time to time for their receipts from the sale of money orders and collections for transportation. Of course if there was any lack of property, either tangible or intangible, in Minnesota to warrant the present assessment and tax, or which would show the fallacy of this valuation method, it is incumbent upon the express company to show it affirmatively. This it has not done, nor has the trial court so found.

The case of Galveston, Harrisburg, etc., Railway Company v. Texas, 210 U. S. 217, relied upon by plaintiff in error, is upon careful analysis, demonstrated to be quite in accord with the other decisions relied upon by Minnesota in this case. In the first place, the same prevailing distinction is found here that is found in all of the cases relied upon by plaintiff in error, namely, the tax sought to be imposed, and which this court held could not be imposed, was not in the nature of a property tax, and was in addition to the regular local taxes, imposed on an ad valorem or other similar basis.

This Court says on page 227:

> "The distinction between a tax, 'equal to' one per cent of gross receipts, and a tax of one per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempts or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state, that *another tax* on the property of a railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

This language as to another tax upon the property was justified by section 6 of the Texas law in question. That section says:

> "The tax provided for by this act shall be in addition to all other taxes levied by law."

Furthermore, it was not contended by Texas either in this court or in the Texas court, that this statute was anything more or different than an occupation tax such as Texas has for practically every known occupation in the state from that of merchant to fortune teller.

If the tax had been a commuted tax on property where the value of the property was measured by its proven earning capacity, the statute would have been susained as is shown by the following language quoted from page 226:

> "In Wisconsin & Michigan Ry. Co., v. Powers, supra, the measure of property by income

> purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 'an annual exercise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multipled by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, and as other property was taxed and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

It is entirely proper for Minnesota to classify property within its borders and to treat such property differently for taxation purposes. Nothing in the Federal Constitution prevents a state from separating a particular class of property and subjecting it to an assessment and taxation in a mode and by a rate different from that imposed on other property, and applying the proceeds to state rather than local purposes.

Michigan Central Railway Company v. Powers, 201 U. S. 245.

The fact that it might be possible for Minnesota to use this system of taxation to the extent of imposing too large a tax, or too heavy a burden upon the transportation company, does not, especially at this time, make a Federal question that concerns this Court, as was well said in Providence Bank v. Billings, 4 Peters, 514, 563, and quoted with approval in Michigan Central v. Powers, 201 U. S. 296:

> "This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security * * * against unjust and excessive taxation; as well as against unwise legislation generally."

The most recent cases cited by the plaintiff in error are those arising under the law of the State of Kansas, requiring the payment of a charter fee into the school fund of that state by corporations intending to carry on business in that state. These cases are The Western Union Telegraph Company v. Kansas and the Pullman Company v. Kansas, and are reported in 216 U. S., pages 1 and 56 et seq. The substance of the decision in the former case has been stated by this court as follows:

> "In the Western Union Telegraph case the State undertook to levy a graded charter fee upon the entire capital stock of one hundred

millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."

Flint v. Stone Tracy Co., 220 U. S. 108, 163.

The Pullman case was similar to the Western Union Telegraph Company case. It may be proper on this account to cite a few paragraphs from the Western Union Telegraph Company case, giving a little more complete statement of what was contained in that case. Mr. Justice Harlan, in delivering the opinion of the Court said, among other things (page 36):

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce, and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools."

Mr. Justice White, in his concurring opinion, says (page 49):

> "No one questions that the tax which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its intrinsic merits. The sole contention is that although the tax is void, the Telegraph Company may not invoke the protection of the Constitution of the United States, because it is in a position where it is not entitled to avail itself of the fundamental safeguards which it was the purpose of the Constitution to secure to all. The reasoning by which it is thus sought to sustain the right of the State to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The State, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such conditions to the privilege of coming in as the State chooses to impose."

The difference between the requirement of the payment of a fee for the purpose indicated and the taxation of the property of a person measured by a percentage of the income of that person from such business is too easily seen to require any further distinctions to be drawn than appear from the opinions from which quotation has been made.

Although the case of Flint v. Stone Tracy Co., 220 U. S. 108, is not in point, yet a certain state-

ment made therein seems to counsel for the defendant in error to have a material bearing upon the case now before this Court. This statement is the latest, apparently, that has been made bearing upon the claims of Minnesota in this case and is as follows:

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This quotation may be paraphrased legitimately so as to read as follows when applied to the case in hand:

It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as property tangible and intangible, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable, such as gross receipts received from a transportation of goods forming a part of interstate commerce. Applying that doctrine to this case, the measure of taxation being the income of the plaintiff in error

from all intrastate sources and certain receipts from interstate business due to its being handled within the state lines, as that is but the measure of a property tax within the lawful authority of the State to impose, it is no valid objection that this measure includes, in part at least, property which as receipts from interstate commerce, could not be directly taxed.

The system of taxation which is now for the first time being subjected to attack, has been in use to a greater or less extent and under varying circumstances and conditions by Minnesota during its entire life as a State. Both the State and the tax payers whose taxes have been computed by this system have alike been satisfied with its practical operation. The method is such that taxation is not easily evaded and the method of collecting taxes is inexpensive; the rate of taxation has been on the average very nearly the same as the rate of taxation of property subject to local assessments. The amount paid fluctuated approximately with the amount earned by the person or corporation taxed. No complaint has arisen, so far as counsel are advised, from any difficulties of bookkeeping on the part of the tax payer; and the State has had few causes of complaint against those paying these taxes on the ground of their attempting to misstate or omit the amount of their gross earnings. No more economical system of taxation has been discovered by the law makers or the taxing departments of the state. The tax has been effective, equitable and adapted to the methods of doing busi-

ness adopted by public service corporations. Of these public service corporations, those engaged in transportation, such as railroads and express companies, are so conducted as usually to make it for the mutual advantage of the state and the companies to have their taxes measured by their current receipts rather than by the value, appraised locally, of their tangible property. The determination of the per cent of gross earnings which should be taken as a commuted tax is not difficult. The supervision of the work of such companies by the Railroad and Warehouse Commission is such as to enable the taxing officials and the legislature to know very nearly what is a fair valuation of the tangible and intangible property of such companies, and knowing the average rate of taxation in the state, it is not a difficult problem to adjust the taxation through the system adopted by Minnesota, to the general measure of taxation throughout the state. This system of taxation permits of an equal distribution throughout all parts of the state of the tax income received from such corporations by the state and is more equitable to the citizens of the state generally than is the system of local taxation through which only the localities are benefited in which the large corporations have their situs for taxation under the more usual systems. All in all there is reason why no complaint is made in this action that the tax upon the plaintiff in error is in any way unfair or inequitable. Certain taxes have been condemned by this Court because of their injustice, and if laws are to be

measured by the justness of the results of their operation, then this taxing law should be sustained by this Court.

SUMMARY OF THE POSITION OF MINNESOTA.

It conclusively appears from all of the previous rulings of this Court that the following principles are well established and are now unquestioned.

First. Interstate commerce itself cannot be taxed by the state.

Second. The instrumentalities or property used in such commerce can be taxed the same as any other property in the state. Its use does not exempt it.

Third. In finding and fixing the taxable value of such instrumentalities or property so used, the state is not limited to the actual intrinsic value of the physical property within its borders, but may fix such value by considering such property, with reference to its relation to the whole transportation system as a unit. To that it can add the value of its intangible property, which follows the tangible like a shadow follows substance.

Fourth. The regular income of property of a permanent character is the best criterion or measure of its actual value, and therefore of its taxable value.

Fifth. If the method used by the state in allocating earnings to the state can be demonstrated to result in actual injustice and inequality to the transportation company, it proves that the state has adopted the wrong method of computation and one which results in depriving the company of its property without due process of law, but it does not interfere with the right of the state to use interstate earnings within the state as a measure of value, provided it can truly ascertain the amount of such earnings.

Applying the foregoing established principles to the case at bar, we reach these conclusions:

A. The Minnesota tax is one on property having its situs in Minnesota, and it is nothing more nor less than the ordinary property tax.

B. Such taxing system of Minnesota effectually measures the approximate value of the intangible as well as the tangible property within the state.

C. It is not claimed by the express company that this system results in any inequality or discrimination or over-valuation.

D. In this case Minnesota properly and legally claims the right to include in the measure of taxation of the value of such property, a prescribed per cent of a part of those earnings which result from

the express company's activities which begin and end wholly within the state.

Respectfully submitted,

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and
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Note: All italics in quotations are ours.

APPENDIX "A."

STATE OF MINNESOTA, SUPREME COURT.

OCTOBER TERM, A. D. 1910.

State of Minnesota,
Respondent,

vs.

United States Express Company,
Appellant.

Opinion by Mr. Justice Bunn.
131 Northwestern Reporter, 489.
S. C. 114 Minnesota, 346.

BUNN, J. Defendant is an express company organized under the laws of New York, and doing business in this state and throughout the United States. This action was brought by the statae to recover the sum of $9,719.66, being taxes alleged to be due on account of gross earnings never reported by defendant. Defendant admitted that it had failed to include in its returns to the proper state officials the items of gross earnings on which the complaint allged taxes were payable, and claimed that such items were not taxable.

A constitutional amendment passed in 1896 (Const. art. 9, § 17) authorized a gross earnings

tax upon express companies. The Legislature in 1897 passed an act (Laws 1897, c. 309, § 6) providing for 3 per cent tax upon the gross earnings of such companies. The rate was increased to 5 per cent in 1899, and to 6 per cent in 1901. The statutes as they are now, and were at the time the action was commenced, provide in substance that every express company shall annually, between January 1st and February 1st, make and file with the State Auditor a statement which shall contain, among other facts, "the entire receipts * * * for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies." The Auditor, between March 1st and April 1st, determines the gross receipts of every such company, and on or before March 15th "shall assess upon each company a tax of 6 per cent upon its gross receipts for business done between points within this state for the preceding calendar year as determined by the Auditor, which shall be in lieu of all taxes upon its property." Revised Laws 1905, §§ 1013, 1015 and 1019.

The facts were stipulated. The items of gross earnings which the company failed to include in its returns to the State Auditor, and which the state claims are taxable, are as follows:

First. Earnings on through shipments consigned from a point in Minnesota to another point in Minnesota, but farwarded over lines of railroad partly without the state of Minnesota. Ninety-one

per cent of this mileage is in Minnesota. The amount of the back taxes claimed on these earnings is $2,991.29, based upon the total earnings of such shipments, without any deduction based upon the portion thereof earned without the state.

Second. "Interstate transfer business"; that is, earnings on interstate shipments received by defendant at a point in Minnesota, carried over its lines to a second point in Minnesota, the transportation by defendant being performed wholly within the state, but the transportation of such shipments while out of the state, and also within the state, but beyond defendant's lines, being performed by other connecting companies. The amount of back taxes claimed on such earnings is $504.47.

Third. Earnings from the issuance of money orders sold and issued by defendant at points in Minnesota. These money orders designate no place of payment, but are payable at any office of the company. Eighty per cent of them are returned through banks and clearing houses to the main office of defendant in New York. No part of the revenue from this service is paid to railroad or other transportation companies. No shipments of money are connected with the issuance and redemption of money orders. The amount of back taxes on the earnings derived from this class of business is $5,788.15.

Fourth. Miscellaneous items, not reported for taxation, representing omitted earnings on intrastate express business handled between points in

Minnesota by defendant during 1899. The amount of back taxes on these earnings is $435.75.

The trial court decided for the state, holding that the earnings embraced in each of the four classes were taxable, and that plaintiff was entitled to judgment for $9,719.66, the full amount claimed. Judgment was entered, and defendant appealed.

We will consider the different classes of earnings separately in the order above stated.

[1] 1. Defendant claims that a tax upon these earnings is a tax upon interstate commerce. We think that the case of Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, is decisive against defendant's contention, at least as to the proportion of the earnings derived from the carriage within this state. The facts in that case are substantially identical with the facts in this. As here, the point of shipment and the point of destination were both within the state; but the route passed through a portion of another state. It was held that this was not interstate commerce, and that the state of the points of shipment and destination could tax earnings on such shipments. It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any

question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery.

Defendant also contends that the language of the statute shows it was not the intention of the Legislature to tax such earnings. This contention is based upon the wording of the provisions that "the gross receipts from business done within this state" shall be returned by the company, and that the tax shall be assessed upon its "gross receipts for business done between points within this state." The intent of the Legislature was clearly to avoid taxing interstate business; but we are unable to see how confining the tax to receipts from business done "between points within this state" indicates an intention to exclude from taxation, or, more correctly speaking, to exclude from the measure of taxation, earnings "between points within this state" in cases where the shipments pass out of the state en route. To so construe the language would be to add a new term to the act.

2. So-called "interstate transfer" business. Carriage of shipments from points in this state to points without this state is undoubtedly interstate commerce, through the carriage without the state is wholly by connecting companies. There is no doubt that it was the intention of the Legislature, as expressed in the act, to include this class of earnings within the state in the gross receipts upon which the tax is based. They are earnings

from business done "between points in this state." The provision that there shall be included by the company in its return "its proportion of gross receipts for business done by such company within this state in connection with other companies" is not, we think, entirely colorless, but bears out the conclusion that the act shows an intent that the state shall be entitled to include such earnings in figuring the taxes to be paid by the company.

[4] The question is whether the Legislature had power to include earnings from such shipments. If the gross earnings tax law is to be construed as a tax upon gross earnings, admittedly a tax upon the earnings from interstate shipments is an interference with interstate commerce; but if such law does not authorize a tax upon gross earnings, if it is a tax upon the property of the corporation within the state, its gross earnings within the state being merely a measure or method of arriving at the value of its property for taxation, it is equally clear that there is no interference with interstate commerce, and the Legislature has not acted beyond its power.

[2] There is nothing in the Constitution or laws of the United States which forbids the state to tax property which is within its borders merely because it is employed in interstate or foreign commerce. State v. Northwestern Telephone Exchange Co., 107 Minn. 390, 120 N. W. 534; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

[3] It has long been settled by the decisions of this court that the gross earnings tax laws were not intended to change the character of the tax, but for the purpose of certainty were intended to change the method of computation. The amount required to be paid remains a tax upon the property, and not against the corporation. The gross earnings tax is a system by which the amount of tax upon the property is determined. City of St. Paul v. St. P. & S. C. R. Co., 23 Minn. 469; County of Ramsey v. C., M. & St. P. Ry. Co., 33 Minn. 537, 24 N. W. 313; County of Todd v. St. P., M. & M. Ry. Co., 38 Minn. 163, 36 N. W. 109; County of Traverse v. St. P., M. & M. Ry. Co., 73 Minn. 417, 76 N. W. 217; M. & St. L. Ry. Co. v. Koerner, 85 Minn. 149, 88 N. W. 430; State v. Canda Cattle Car Co., 85 Minn. 457, 89 N. W. 66; State v. Northwestern Telephone Co., 107 Minn. 390, 120 N. W. 534.

It is true that this court has never construed this particular law; but we are not able to see why the decisions on the railroad tax laws and on the telephone tax law should not rule this case. It is pointed out that the title to the act used the expression "Taxation of Express Companies," and that the Revised Laws uses the term "Tax upon Its Gross Receipts," though this latter language was not in the act itself. But what the tax is called is not material. The act for this tax was passed on the same day and pursuant to the same constitutional amendment as the law providing for a gross earnings tax upon telephone companies,

which was construed to be a property tax. It is quite clearly a part of the same general scheme of taxation—the system of using gross earnings as a method of arriving at the amount of the tax upon the property. The gross earnings system, as applied to railroads, had been in force many years at the time this constitutional amendment was adopted, and when the laws were passed applying the system to telephone and express companies. The railroad tax laws had received the construction of the courts that the tax was not upon gross earnings, but on property. It seems fair to assume that the Legislature had this construction in view, and did not intend to tax the gross earnings of express companies, but did intend to extend a system of taxation that had proven satisfactory.

The decisions of this court, if followed, lead clearly to the conclusion that the law in question provides for a property tax, and is not, therefore, a tax upon interstate commerce when applied to the receipts for business within the state, though the shipments come from or go to a point outside the state. We do not feel justified in departing from the doctrine of these decisions because of the recent decisions of the United States Supreme Court relied on by defendant. It is by no means clear that the court has rendered any decision on the subject that is contrary to those of this court. The earlier cases established the principle that a tax upon the earnings from interstate commerce is an interference with such commerce, but do not hold that a gross earnings system of taxation can-

not be construed as a tax upon property. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Philadelphia & Southern S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Ratterman v. Western Union Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; Western Union Co. v. Alabama, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409. In Pullman v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, it was held that a tax upon the capital stock of the Pullman Company, on a basis of assessing such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run, was, in substance and effect, a tax upon property. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, the state statute required railroad companies to pay an annual tax for the privilege of exercising its franchise in the state, the amount to be determined by the amount of its gross receipts. It was provided that, where a railroad lay partly within and partly without the state, the tax should be equal to the proportion of its gross receipts within the state; its amount to be determined by dividing the gross receipts of the company by the total number of miles operated, thus ascertaining the average gross receipts per mile, and then multiplying the result by the number of miles operated within the state. It was held that this was not a tax upon gross receipts, but resort to the receipts was

to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. The law was held not to be a regulation of interstate commerce.

Statutes applying similar methods of taxation to telegraph companies and to express companies have been sustained, as essentially property taxes, and not an interference with interstate commerce. Western Union Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683. In McHenry v. Alford, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614, where the court had under consideration a railroad gross earnings tax law of the terrtory of Dakota, though the question of interference with interstate commerce was not decided, Mr. Justice Peckham clearly intimates that the act was not a tax upon gross earnings, but provided a different method of taxation upon the property of the company. His language is in point: "Where it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

In Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, a gross earnings tax law of Texas was held to violate the commerce clause of the Constitution. The majority of the court, speaking through Mr. Justice Holmes, while expressly stating that "by whatever name it may be called, if it amounts to no more than a tax upon property, or its just equivalent, such a law is not open to attack as inconsistent with the Constitution," holds that the act there in question was not a property tax, but a direct tax on gross receipts. Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, is followed, and Maine v. Grand Trunk Ry. Co. distinguished. The Galveston case is really the only utterance of the United States Supreme Court that appears at all inconsistent with the cases in this court holding that the gross earnings tax is a tax upon property, and even here the doctrine is fully recognized that some gross earnings tax laws should be so construed. The act under consideration in the case at bar is, we think, fairly distinguishable from the act considered in the Galveston Case. Our constitution, under which the act was passed, authorizes the imposition of a tax "upon the property within the state" of express companies, by taxing the gross earnings. The act provides that the tax "shall be in lieu of all other taxes upon the property of any express company * * * paying the same."

Giving due weight to the cases of the Supreme Court referred to and others we have not referred

to, taking into consideration the language of the constitutional amendment and of the act itself, viewed in the light of the construction that had been placed upon the railroad tax laws before this act was passed, we feel that no other course is open but to adhere to our former decisions.

[5] 3. Receipts from money orders sold by defendant at points in Minnesota. This item is divided into earnings on money orders redeemed without the state and those redeemed within the state. It cannot be seriously claimed, and we do not understand defendant to claim, that taxation of these earnings violates the commerce clause of the Constitution. Nathan v. Louisana, 8 How. 73, 12 L. Ed. 992. The fees for all money orders issued within the state are paid in this state. The orders are redeemable at any office of the company within or without the state. No transportation of money is involved. As far as the validity of the tax is concerned, there seems to be no material distinction between the orders that are redeemable within Minnesota and those redeemable elsewhere. The company is engaged in a banking business in the state, the earnings from which are not taxed at all unless under this act.

It is argued by defendant that, to the extent that defendant is engaged in business other than the express forwarding business, it cannot be regarded as an express company within the meaning of the statute. The statute defines an express company as a corporation that is engaged in the business

of conveying articles by express; but it by no means follows that a corporation that is also engaged in other business is not still an express company, and liable to pay taxes on the property used in such other business. It was and is a well-known fact that express companies sell and redeem money orders. Defendant's charter authorized it to do a banking and exchange business. No reason is apparent why the Legislature should exempt from taxation the property employed in such business. The statute does not confine the tax to earnings from transportation. It says that the company shall return a statement of its "entire receipts for business done within this state"; that the Auditor shall determine the "gross receipts of such company," and shall assess a tax upon its gross receipts for business done between points within this state. We think that the selling of money orders within the state is business done within the state, within the fair meaning of the language of the act.

[6] The point is made that taxing these receipts violates the provisions of the federal Constitution and the state Constitution requiring that taxes must be uniform and levied without discrimination and guaranteeing the equal protection of the laws and due process of law. The argument is that the classification is unreasonable and arbitrary, in that the receipts from similar business carried on by others than express companies are not taxed. We are not willing to grant the truth of the premise. It is true that receipts from the sale of exchange

by banks are not taxed directly, but the system of taxation applied to banks is not the gross earnings system, and it is not right to say that a bank pays no tax on the receipts from its exchange business, or upon the property used in that business. Defendant points out the similarity in this respect between this case and the corporation tax case decided by the Supreme Court of the United States, since its brief and argument in this case was made. As that decision upholds the validity of the corporation tax law, it is needless to discuss further the constitutional objections urged here by defendant. We hold that the state was entitled to assess a tax upon the receipts from defendant's sale of money orders within the state.

[7] 4. Miscellaneous items of earnings in 1899, not reported for taxation. The only point urged here is that the statute of limitations bars a recovery of these items. This point applies also to the taxes for 1899 included in the previously considered items. The act provided that the Auditor shall make the assessment on or before March 15th of each year upon the gross receipts for the preceding year, and shall deliver to the State Treasurer for collection a draft upon the company for the amount assessed. The company has 60 days after demand by the State Treasurer in which to pay the tax before any penalty accrues. It is clear in our opinion that no cause of action accrued to recover these taxes until 60 days after demand by the State Treasurer, which would be May 1, 1900, at

the earliest. State v. Sage, 75 Minn. 448, 78 N. W. 14; R. L. 1905, § 4071. At this time the limitation was six years, but before this six years expired, on March 1, 1906, the Revised Laws of 1905 went into effect. Section 980 of the Revised Laws abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property subject to taxation.

[8] Defendant argues that section 980 is merely a re-enactment of section 82, c. 2, Special Laws of 1902, which, according to the title of the chapter, concerned only the taxation of real estate; but the title was omitted, and the body of section 82 incorporated in the revision as a general provision, under chapter 11, entitled "Taxes." Section 980 is not now subject to the limitations in the original title to chapter 82. State v. Barnes, 108 Minn. 230, 122 N. W. 11. Defendant's contention that section 980 relates only to the assessment of taxes upon property as such, and not to a tax based upon gross earnings, is not substantiated by the language of that section, which is clearly broad enough in its terms to include all taxes due the state. As we have held in this and in many other cases, a gross earnings tax is a tax upon property. We hold that section 980 does apply to gross earnings taxes, and that there is no limitation of time upon the right of the state to enforce collection of such taxes.

[9] 5. Defendant makes the further point that none of the omitted earnings can now be taxed, or the taxes now collected, for the reason that no pro-

vision is made in the laws for making a reassessment or a subsequent assessment on omitted earnings. It would be manifestly wrong if this power did not exist, and we are of the opinion that it does. Section 1585, R. L. 1905. The cases of State v. Minnesota & International Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007, and State v. N. W. Telephone Exchange Co., 107 Minn. 390, 120 N. W. 534, were brought to recover taxes on omitted gross earnings for prior years, and proceeded to final judgment on the theory that such taxes could be recovered, though it is true that the point made by defendant in this case was not raised in either of the cases cited. We hold that the state may recover taxes on earnings for prior years not reported by the company.

Our conclusion on the whole case is in accord with that reached by the trial court, except as to 9 per cent of the taxes under the first item. We hold that 9 per cent of the taxes assessed on earnings on this class of business should be deducted from the judgment.

Remanded, with directions to modify the judgment in accordance with this opinion.

APPENDIX "B."

Laws of Minnesota Relative to Taxation of Express Companies.

(Sections are from Revised Laws Minn. 1905.)

(1012) DEFINITION—Every person, company, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silver plate or other articles, by express, shall be deemed to be an express company.

(1013) ANNUAL STATEMENT—Annually between January 1 and February 1, every such express company doing business in this state shall make and file with the state auditor a statement in such form as he may prescribe, verified by the person, constituting such company, if a person, or by its president, secretary, treasurer, superintendent or chief officer in this state, if an association or corporation, containing the following facts:

1. The name of the company.

2. The nature of the company, whether a person or persons or association or corporation, and under the laws of what state or country organized.

3. The location of its principal office.

4. The name and postoffice address of the president, secretary, auditor, treasurer, and superintendent or general manager.

5. The name and postoffice address of the chief officer or managing agent of the company in this state.

6. The entire receipts, including all sums earned or charged, whether actually received or not, for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies.

7. A statement of the amount actually paid by such express company for the year then next preceding December 31, to the railroads within this state for the transportation of its freight within this state, showing the amount paid to each railroad company.

8. The entire receipts of the company for business done within this state, as defined in subd. 6, after deducting the amounts paid for transportation of freight as in subd. 7.

On application the auditor shall furnish blanks for making such statements.

(1014) LOCAL AGENT TO MAKE STATEMENT WHEN—If any such company shall fail or refuse to make such report on or before February 1, the auditor shall notify its local agent of such default, by letter mailed and addressed to such agent at his postoffice address, inclosing a form of return to be made out by him; and thereupon it shall be the duty of each such agent within this state, on or before March 1, to make out and file with the auditor his verified statement, containing

such of the facts prescribed in Sec. 1013 as the auditor may require, but the statement of gross receipts, and the deduction therefrom, defined in Sec. 1013, subds. 6, 7, shall include only those of his agency.

(1015) AUDITOR TO DETERMINE GROSS RECEIPTS—The auditor shall annually, between March 1 and April 1, ascertain and determine the gross receipts of every such company by deducting the sums annually paid by it for transportation of freight, as defined in Sec. 1013, subd. 7, from its entire receipts for business done in this state, as defined in Sec. 1013, subd. 6. In case of the failure or refusal of any company or its agents to make the statement required by law, the auditor shall inform himself as best he may on the matters necessary to be known in order to discharge his duty under this section. At any time before March 1 in each year, or before the gross receipts have been determined as hereinbefore provided, any company or person interested may, on written application, appear before the auditor and be heard in the matter.